The Coca-Cola Bottling Company of Memphis *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196. Cases 26-CA-4991, 26-CA-5213, 26-CA-5620, and 26-CA-5729

23 April 1984

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 17 June 1982 Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief to the exceptions of the General Counsel and the Charging Party.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified herein.

The judge found that Mary Evelyn Watkins, an unfair labor practice striker on whose behalf an unconditional offer to return to work was tendered, effectively "waived" her entitlement to an offer of reinstatement to her former position. The General Counsel and the Charging Party except to this finding, contending that the Respondent at no time satisfied its statutory obligation to reinstate Watkins to her available former position of employment and that Watkins never forfeited her right of reinstatement. We find merit in these contentions.

The judge found, and we agree, that unfair labor practice strikers formerly employed as bottle inspectors, including Watkins, were entitled to their former positions on the tender of an unconditional offer to return to work in September 1976.[3] The evidence establishes, however, that notwithstanding such a tender on their behalf the Respondent failed to offer proper reinstatement to several of the returning bottle inspectors,[4] even though their former positions were available. Instead, the Respondent offered to these former bottle inspectors an entirely different position as a bottle sorter.[5] Unlike the other returning bottle inspectors, who refused the Respondent's offer as they lawfully were entitled to do, Watkins elected to accept the offer which was accompanied by a representation of the Respondent's personnel director, Donaldson, that "shortly" thereafter she would be placed on her former bottle inspector's job. Despite Watkins' subsequent inquiry to her immediate supervisor regarding her promised return to her former position,[6] the Respondent at no time ever made to

[1] The General Counsel, the Respondent, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. B,1 of his decision, the judge states that the Respondent sent Lloyd Prescott Jr. a letter in early 1977 offering him work. The record, however, does not affirmatively establish that such a letter was in fact sent to Prescott. However, as it is readily apparent that the judge discredited Prescott's testimony on other grounds, in addition to the foregoing, we find that this does not materially affect the ultimate conclusion reached by the judge.

We adopt the judge's conclusion, based on his credibility resolutions, that Osker Lee Davis was entitled to reinstatement. We find, however, that the Respondent's good-faith belief that Davis had engaged in misconduct was established by the signed statement and oral identification of Davis by Wise, who died prior to trial. Nevertheless, we also agree with the judge that the General Counsel satisfied his burden of proving by a preponderance of the evidence that Davis in fact engaged in no misconduct and therefore the Respondent violated Sec. 8(a)(1) by discharging Davis. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

We adopt the judge's conclusions as to those employees denied reinstatement by the Respondent because of alleged strike misconduct as set forth in sec. G of his decision. We have carefully examined the record and find the judge's conclusions to be fully consistent with the principles set forth in our recent decision in *Clear Pine Mouldings*, 268 NLRB No. 173 (Feb. 22, 1984), and we affirm his conclusions on that basis.

[2] We agree with the judge that striking employees Cathey and Fuller voluntarily abandoned their struck jobs and therefore are not entitled to reinstatement and backpay. It is undisputed that during the strike Cathey and Fuller crossed the Union's picket line, returned certain equipment to the Respondent for which each received a refund of their initial deposits, and signed both an equipment refund form and a resignation form stating on its face that each "quit" his employment. Contrary to our dissenting colleague who contends that the signed resignations are invalid because the resignation forms were produced concurrent with the equipment refund forms, we find that Cathey and Fuller clearly expressed their intention to abandon their employment by signing the resignation forms and that the Respondent was privileged to rely thereafter on these unequivocal written expressions of resignation in determining its future employee complement. In view of all the circumstances surrounding the resignations we agree with the judge that the evidence is insufficient to support an inference that the Respondent coerced or unduly influenced Cathey and Fuller into signing the resignation forms against their will. Thus Personnel Manager Donaldson credibly testified that strikers could obtain equipment refunds without resigning their employment. Indeed, Fuller never claimed that he signed the resignation form involuntarily. Instead Fuller maintained incredibly that the signature on the form was not his notwithstanding that it matched other samples of his signature. With respect to Cathey the judge credited Donaldson's testimony that when Cathey sought employment at the conclusion of the strike he admitted to Donaldson that he had quit his job during the strike and thereafter had secured other employment.

In view of these credibility findings, as well as Cathey's and Fuller's voluntary appearance during the strike at the Respondent's personnel office at their own initiative and the unequivocal language on the face of the resignation forms that Cathey and Fuller signed, we find that Cathey and Fuller voluntarily abandoned interest in their struck jobs.

[3] *Custom Craft Mfg. Co.*, 212 NLRB 255, 258 (1974).

[4] Bottle Inspector Geneva Sheffa received belatedly a proper offer of reinstatement in August 1977.

[5] We agree with the judge, for the reasons set forth by him, that the positions of bottle inspector and bottle sorter are "significantly different."

[6] Watkins testified, without contradiction, that she "asked the supervisor that I was working under at the time" about getting back her job as a bottle inspector. Accordingly, the record fails to support the judge's finding that there is no evidence that Watkins asked to be put on a bottle inspector's job as promised.

Watkins a proper offer to a bottle inspector position. Watkins continued as a bottle sorter for approximately 3-1/2 months, after which she resigned because of physical problems with her hand.

On this record, we find no basis to warrant a finding that Watkins effectively "waived" her statutory right of reinstatement to her available former position as a bottle inspector. Contrary to the judge, the record fails to support an inference that Watkins voluntarily relinquished her statutory right as a returning unfair labor practice striker to her former position. Indeed, at the time of Watkins' acceptance of the bottle sorter position, the Respondent clearly led Watkins to believe that the assignment was temporary in that she "shortly" would be returning to a bottle inspector position. Further, it is evident that Watkins specifically inquired of her supervisor, albeit to no avail, about her promised return to her former position. That Watkins elected to accept temporarily a different position and remained in that position for a period of 3-1/2 months before resigning does not, standing alone, constitute a voluntary abandonment of her statutory right to her former position. Thus, no justification exists for imposing on Watkins a statutory right inferior to that of the other bottle inspectors, who elected to reject out of hand the Respondent's legally insufficient offer of reinstatement to an entirely different position. In short, Watkins was "faced with a situation where [she] could take the job offered or wait perhaps forever for [her] old job to become vacant." *Custom Craft Mfg. Co.*, supra at 258. That she decided to accept temporarily a different position in the face of this alternative hardly amounts to the abandonment of her right to a proper offer of reinstatement. Moreover, a refusal to find a waiver in such circumstances is in accord with the fundamental statutory policies providing for the full and timely reinstatement of unfair labor practice strikers, such as Watkins. Accordingly, we find that Watkins is entitled to proper reinstatement to her former bottle inspector position and backpay.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, The Coca-Cola Bottling Company of Memphis, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer employees Osker Lee Davis, Tinnie Mae Kones, Pearlie Turner, Robert Bonds, Marshall Moore, and Mary Evelyn Watkins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER ZIMMERMAN, concurring in part and dissenting in part.

I agree with my colleagues that unfair labor practice striker Watkins did not forfeit her right to reinstatement for the reasons stated by the majority. I do not agree, however, with their adoption of the judge's finding that unfair labor practice strikers William Cathey and Roosevelt Fuller forfeited their right to reinstatement and backpay by voluntarily resigning their employment during the course of the strike against the Respondent. The General Counsel and the Charging Party contend that these strikers did not abandon their employment rights as returning unfair labor practice strikers and thus are entitled to an offer of reinstatement to their former positions. I find merit in these contentions.

With respect to Cathey, the record establishes that on 22 July 1975, 2 weeks after the commencement of the strike, Cathey appeared at the Respondent's personnel office to turn in two pieces of equipment customarily utilized by him on the job: a hardhat and a pair of safety goggles. On delivery of this equipment, Cathey was reimbursed for his 15 April 1975 deposit on that equipment in the amount of $8.75 and signed a deposit and refund card memorializing this transaction. According to Cathey's uncontradicted testimony,[1] when he arrived at the Respondent's facility to turn in his equipment, "I didn't know whether I had to sign any papers or not," but was told at the personnel office, on tendering his equipment, that "I had to sign some papers." At that time, Cathey signed two documents: the aforementioned deposit and refund card and a separation slip ostensibly terminating his

[7] Because Watkins at no time ever received a proper offer of reinstatement, her subsequent resignation from an entirely different position has no bearing in determining her present right of reinstatement. However, inasmuch as Watkins' status has been litigated in the context of the "(C) proceeding" herein—"Notice of Hearing Without Backpay Specification"—we make no determination as to appropriate amounts of backpay owing to Watkins or the effect, if any, of her resignation from the bottle sorter position on her overall backpay entitlement. See *American Mfg. Co. of Texas*, 167 NLRB 520, 522 (1967).

[1] The Respondent presented no witnesses who were present on 22 July 1975 when Cathey appeared at the Respondent's personnel office. Accordingly, Cathey's version of these events is uncontradicted.

employment.[2] Cathey testified that he turned in his equipment because he "didn't know" whether he would be returning to work with the Respondent or whether "they were going to hire me back or not."

With respect to Fuller, the evidence establishes that on 12 September 1975 Fuller appeared at the Respondent's facility during the course of the strike and sought to turn in his work uniform. Fuller indicated that he needed money to pay some bills. As with Cathey, on turning in his property to the Respondent's personnel office, the Respondent contemporaneously produced both a separation slip and a deposit and refund card for signature. Pursuant to that request, Fuller signed the separation slip[3] and received reimbursement of his initial deposit in the amount of $32. In the case of both Fuller and Cathey no evidence has been presented that, prior to executing the separation slips, either Fuller or Cathey expressed any indication whatsoever to the Respondent that they desired to terminate their employment for any reason[4] or that they, soon thereafter, abandoned the strike or sought other permanent employment.[5]

It is well settled that the party challenging the employee status of a striker has the burden of rebutting the presumption that strikers have a continuing interest in their struck jobs, and must affirmatively establish that the striker has, in fact, evidenced an intention to abandon permanently his former position. *Harowe Servo Controls*, 250 NLRB 958, 964 (1980). It is equally well established that execution of a termination form during a strike, standing alone, does not necessarily establish a permanent abandonment of the struck position. *P.B.R. Co.*, 216 NLRB 602, 604 (1975); *S & M Mfg. Co.*, 165 NLRB 663 (1967). Rather the determination of whether strikers have evinced an intention to abandon permanently their former position must be determined on a case-by-case basis.

Applying these principles, I find that the circumstances attendant to Cathey's and Fuller's execution of separation slips fail to establish affirmatively that either evinced an intention permanently to abandon his struck position. At the outset, I fully recognize that both Cathey and Fuller initiated contact with the Respondent. Further, it appears that the Respondent does not maintain a general policy requiring employees to resign their employment in order to obtain equipment refunds.[6] Irrespective of this general policy, however, the objective evidence surrounding the specific execution of the separation slips by Cathey and Fuller indicates quite the opposite. Thus it is clear that, in the cases of Cathey and Fuller, the separation slips were proffered at the sole initiation of the Respondent and not at the initiation of the strikers. In both instances, on the tender of the returned property, the Respondent indicated effectively that it was necessary that each execute a separation slip in order to receive his refund. Indeed, it is evident that separation slips were produced by the Respondent contemporaneously with the tender of the property by Cathey and Fuller, notwithstanding that neither individual made any mention that he wanted to resign his employment. The logical inference to be drawn from these objective circumstances is that execution of the separation slips effectively constituted a condition precedent for the return of the deposits. In such circumstances, execution of a separation slip is insufficient to establish affirmatively that the strikers abandoned interest in their struck positions. See *P.B.R. Co.*, supra at 604. Further, as there is no probative evidence otherwise establishing that Cathey and Fuller evinced an intention to abandon permanently their former positions, it is apparent that the Respondent has failed to rebut the presumption that Cathey and Fuller continued to maintain interest in their former positions.[7] Accordingly, I find that Cathey and Fuller, as returning unfair labor practice strikers, are entitled to reinstatement to their former positions, and I dissent from the majority's failure to so find.[8]

[2] Cathey, who cannot read, testified that both documents were read to him before he signed them. The separation slip contains, inter alia, three blank designations—"LAID OFF," "DISCHARGED," and "QUIT." The latter is checked off on Cathey's signed form. Also appearing is the signature of Cathey's supervisor, James Wimbley. Wimbley did not testify.

[3] The signature of Supervisor Oscar Rapp also appears on the separation slip. Rapp, however, did not testify.

[4] In contrast to Cathey and Fuller, I note that the judge specifically discredited the testimony of Raymond King and Willie Jefferson, two other strikers whose reinstatement is sought by the General Counsel and the Charging Party, with respect to the circumstances surrounding their resignations. Unlike the circumstances attendant to Cathey's and Fuller's seeking of refunds, in which the Respondent presented no witnesses who may have been present on those occasions, the witnesses presented by the Respondent as to King and Jefferson testified, and were in fact credited by the judge. While the judge credited certain testimony of Personnel Director Donaldson as to Cathey and Fuller, it is clear that Donaldson was not present when Cathey and Fuller executed separation slips. Thus, Donaldson did not testify directly regarding the specific sequence of events occurring on those occasions.

[5] The evidence indicates that Cathey secured full-time employment elsewhere in March 1976, approximately 8 months after the return of his equipment.

[6] The Respondent's personnel director, Donaldson, credibly testified that strikers may obtain refunds without resigning.

[7] The judge's reliance on *Beverage-Air Co.*, 185 NLRB 168, 170 (1970), and *Mississippi Steel Corp.*, 169 NLRB 647, 663 (1968), to support his denial of reinstatement to Cathey and Fuller is misplaced. In *Beverage-Air Co.*, unlike the instant case, the execution of termination slips occurred after termination of the strike and both employees therein indicated affirmatively either that they already had another job or had firm expectation of another job. In *Mississippi Steel Corp.*, the Board in fact ordered appropriate reinstatement of the strikers at issue.

[8] In all other respects I concur with the findings and conclusions of my colleagues.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to properly reinstate unfair labor practice strikers to their former positions if they exist, or substantially equivalent positions if they do not, upon their unconditional offer to return to work at the end of a strike.

WE WILL NOT discriminate against our employees because they participate in a strike or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Osker Lee Davis, Tinnie Mae Kones, Pearlie Turner, Robert Bonds, Marshall Moore, and Mary Evelyn Watkins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them and employee Catherine Duncan whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL pay to Geneva Sheffa the sum of $3821 and to Eddie Scott the sum of $481 plus interest accrued to the date of payment, less appropriate amounts for social security taxes and tax withholdings required by Federal, state, and local laws.

THE COCA-COLA BOTTLING COMPANY OF MEMPHIS

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried for 13 days in the fall of 1981 in Memphis, Tennessee. The case arises from a prior proceeding involving the same parties in which the Respondent was found to have violated Section 8(a)(1), (3), and (5) of the Act. The Board's original decision, reported at 232 NLRB 794, issued on September 30, 1977. A Supplemental Decision, which issued on January 3, 1979, is reported at 239 NLRB 794. On February 25, 1980, the Board's order was enforced, with one modification, by the United States Court of Appeals for the Sixth Circuit. After certiorari was denied by the Supreme Court, the final decree of enforcement was entered by the Sixth Circuit on November 24, 1980.

Of particular significance in the instant case is the finding by the Board in the prior proceeding that a strike by Coca-Cola Bottling Company of Memphis (the Respondent) employees, which began on July 7, 1975, was an unfair labor practice strike from its inception. The striking employees thus had certain rights under the Labor Act whose exercise is the subject of the instant case. The Regional Director originally divided the case into two proceedings: the first identified for convenience as the (B) proceeding involved the reinstatement rights of strikers whose backpay period had been tolled as of a certain date and thus whose backpay could be specified. The second known as the (C) proceeding involved reinstatement rights of strikers whose backpay allegedly had not been tolled. Because I believe the distinctions unwarranted[1] and because both proceedings involved common issues concerning the right of strikers to reinstatement in the first instance, I consolidated the two proceedings by order issued on November 20, 1981.

The Respondent filed answers to the General Counsel's pleadings and specifications which contested the eligibility of the strikers for reinstatement and also, for those whose backpay amounts were specified, contested liability for such backpay. The issues were joined for a total of 95 individuals, 31 in the (B) proceeding and 64 in the (C) proceeding. During the trial, 22 individuals were either deleted or the subject of dismissals, thus leaving 73 individuals whose reinstatement rights are still at issue.

The General Counsel filed an opening brief of 118 pages plus an appendix, and the Respondent filed an opening brief of 339 pages. Both parties also filed answering briefs which were received about March 4, 1982.

Based on the testimony and the demeanor of the witnesses and the entire record herein, I make the following[2]

FINDINGS OF FACT

A. *Background*

The Respondent's employees engaged in an unfair labor practice strike which began on July 7, 1975. The employees were and are represented for purposes of collective bargaining by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 1196 (the Union or the Charging Party). Of the approximately 353 employees who engaged in the strike, 181 employees returned to work during the course of the strike. Employees who participated in the strike received strike benefits for each week of the strike. Employees who collected strike benefit checks did so in person at the union hall after signing for

[1] Actually, a number of the individuals in the (C) proceedings would have had their backpay tolled had the Respondent improperly denied them reinstatement.

[2] In accordance with the Board's findings reported at 232 NLRB 794, the Respondent is found to be an employer engaged in interstate commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and the the Union is found to be a labor organization within the meaning of Sec. 2(5) of the Act.

them. The checks were distributed on Fridays covering payments for the previous week.

On September 20, 1976, the day after a union meeting attended by about 130 employees, the Union made an unconditional collective offer on behalf of all striking employees to return to work. The telegram containing the offer reads as follows:

> THIS IS TO NOTIFY YOU THAT AS OF THIS DATE, SEPTEMBER 20, 1976, AT MIDNIGHT, THE STRIKE BY TEAMSTERS LOCAL 1196 IS TERMINATED. ON BEHALF OF ALL STRIKERS I HEREBY UNCONDITIONALLY APPLY FOR REINSTATEMENT TO THEIR FORMER JOBS AND THE MAXIMUM EMPLOYMENT OF OPPORTUNITY WHICH THE LAW ALLOWS. THIS IS A CONTINUING REQUEST FOR EMPLOYMENT. THE UNION WILL ASSIST IN CONTACTING EMPLOYEES TO RETURN TO WORK IF YOU WISH. IF YOU HAVE DIFFICULTY NOTIFYING EMPLOYEES PLEASE CONTACT THE UNION AT 901-369-1003 FOR ASSISTANCE OR THE UNDERSIGNED.

The next day, on September 21, 1976, the Respondent replied to the Union's telegram as follows:

> THIS ACKNOWLEDGES RECEIPT OF YOUR TELEGRAM ON BEHALF OF TEAMSTERS LOCAL 1196 TERMINATING STRIKE EFFECTIVE MIDNIGHT SEPTEMBER 20, 1976. ALL STRIKING EMPLOYEES WHO DESIRE TO REPORT TO WORK IN COMPLIANCE WITH YOUR TELEGRAM SHOULD APPEAR AT THE PERSONNEL OFFICE AT THE PLANT AT THEIR USUAL STARTING TIME ON MONDAY, SEPTEMBER 27, 1976, READY TO BEGIN WORK. REINSTATEMENT WILL BE GIVEN IN ACCORDANCE WITH APPLICABLE LAWS. WILL EXPECT UNION TO CONTACT EMPLOYEES FOR RETURN TO WORK IN ACCORDANCE WITH COMMITMENT IN YOUR TELEGRAM. BY THIS TELEGRAM, COCA-COLA BOTTLING COMPANY OF MEMPHIS DOES NOT WAIVE OR ABANDON ANY RIGHT TO REFUSE REINSTATEMENT TO ANY INDIVIDUAL STRIKER WHOSE MISCONDUCT HAS FORFEITED HIS OR HER RIGHT TO REINSTATEMENT.

The Union's counsel responded to the Respondent's telegram with a letter to the Respondent's counsel dated Friday, September 24, 1976. The letter read as follows:

> I am in receipt of your telegram dated 9/21/76, wherein you state *inter alia* "will expect union to contact employees for return to work in accordance with commitment in your telegram." Teamsters Local 1196 will attempt to notify all striking employees of the contents of your telegram, however, it will not accept the obligation which is correctly the employers' to notify each employee in writing or in some other appropriate manner that they are being offered an opportunity to return to work.
>
> Once again I renew the union's offer to assist in contacting the employees should the employer have some difficulty in notifying or locating the striking employees.

On Sunday morning, September 26, 1976, the Union held a meeting of the Respondent's striking employees at its union hall. At that meeting, Union President Bill Maxwell, and Union Counsel Lynn Agee spoke to the employees and informed them of the Respondent's acceptance of their unconditional offer to return to work. The employees were told to report to the personnel office the next day at their regularly scheduled work hour.

During the week of September 20, 1976, the Respondent's personnel director W. D. "Buddy" Donaldson posted five copies of the following "Notice to Supervisors" on the Respondent's general bulletin boards. The notice stated:

> Teamsters Local Union 1196 notified us that they were calling off the strike and offered to return all strikers to work. In compliance with federal labor laws, the Company will be reinstating those strikers who were not guilty of serious misconduct during the strike.
>
> It is the obligation of the Company not to discriminate against any employee because of his or her participation in a strike. Every employee is to be treated in the same manner whether or not they were a part of the strike. We will expect each of you to carry out this policy. Also, you are not to permit any employees to coerce any other employees because of participation in or refusal to participate in the strike. If any situation develops, please notify the Personnel Office for handling.

As returning strikers reported for work early Monday morning, September 27, 1976, they were asked to write their names on a sign-in log and were handed an application form and a form entitled "Notice to Employees." The notice to employees read as follows:

> As a former striker, you will be reinstated in accordance with the law. You are being asked to bring the Company's records up to date by filling out an application form. This does not mean that you are being treated as a new employee. The purpose of this notice is to let you know the reason for the application form and to prevent misunderstanding.

After completing an application, the employee was directed to Donaldson's office to meet with Donaldson and General Manager Charles Pierotti. Each employee was then interviewed concerning his or her former position, correct name and address, and whether the employee was physically ready to return to work. Donaldson was also presented the employee's personnel file which was pulled by Donaldson's secretary after the employee had signed the log.

Some returning strikers questioned the Respondent's procedure of having employees fill out application forms and Union President Maxwell was summoned to the plant. He met with Donaldson about the matter. After the meeting he went outside and spoke to the employees.

He explained to them that they would have to fill out the applications.[3]

All of the employees who presented themselves for reinstatement on Monday, September 28, were not able to be processed or seen by Donaldson on that day. They were told to return the next day when more were processed and put back to work. The Respondent maintained its sign-in log and Donaldson continued to see returning strikers through the next Monday, October 4, 1976. There is no evidence that the Respondent refused to rehire any returning striker unless he or she had presented themselves for reinstatement by any particular date. In early 1977, the Respondent sent letter offers of jobs to about 40 former strikers who had not been reinstated and about 8 or 9 returned to work in response to those letters.

According to Donaldson's records, 266 of the 353 individuals who engaged in the strike were reinstated: 181 returned to work during the strike; 42 were reinstated on Monday, September 27; 31 were reinstated on Tuesday, September 28, and 12 employees were reinstated thereafter. According to Donaldson, 19 of the employees were regarded as having quit; 42 did not present themselves for reinstatement; 12 had engaged in serious misconduct; 5 were not reinstated until they provided satisfactory medical evidence; and 11 refused to return to their former positions or insisted on different jobs.

As I have indicated, there are 73 strikers whose reinstatement rights are at issue in this proceeding. They fall into several categories and I shall consider each category separately.[4]

B. *The Strikers Who Did Not Present Themselves For Reinstatement*

It is undisputed that 30 of the 73 alleged discriminatees did not present themselves at the plant for reinstatement at any time between September 27, 1976, and the end of the year. Twenty-one of them did not even testify at the trial.[5] None of the nine alleged discriminatees who did testify gave sufficient reasons to explain their failure to present themselves for reinstatement after the end of the strike.[6] Over half of these 30 employees were nevertheless sent letters offering them reinstatement in early 1977. Some accepted and returned to work.

In addition to the 30 employees who concededly did not present themselves for reinstatement, there is a factual question as to whether 6 others actually presented themselves for reinstatement. I find that they did not properly respond to the Respondent's offer of reinstatement and thus are included along with the 30 other employees to make a total of 36 employees who did not present themselves for reinstatement within the terms of the Respondent's offer of reinstatement.

1. The six employees whom the General Counsel asserts presented themselves for reinstatement

a. *Percy Coleman and John Fitzpatrick*

Percy Coleman, a second-shift warehouse laborer, participated in the strike. He learned that the strike was over and went to the plant to "get my job back." He spoke to Alvin Truelove, the night foreman, and asked him if he was hiring. According to Coleman, Truelove said the Respondent "wasn't hiring anymore." Colemen then left. He testified that several other persons were present at the time, including employee John Fitzpatrick.

Coleman admitted he received a letter from the Respondent, dated February 18, 1977, asking him to report to the personnel office if he desired to return to work. He testified he went to the plant and talked to Truelove again, "at the gate, the personnel gate." According to Coleman, Truelove told him "they still wasn't hiring."

Coleman testified that he received strike benefits through the week ending September 26. Since those benefits were collected by the strikers at the union hall and in person, union officials had the opportunity to inform Coleman of the Respondent's offer of reinstatement. Coleman testified that, on both occasions, he met Truelove in the morning, even though he acknowledged that Truelove normally came to work about 3 p.m. when the second shift began. Coleman also testified that he knew he was to report to Donaldson but that he did not do so. He testified, "I went in there to ask him, but I didn't get to see him." He also failed to report to Donaldson after receipt of the Respondent's February 1977 letter. Coleman's testimony is not altogether clear, but it does seem that his responses to the offers of reinstatement were halfhearted at best.

Truelove, the night warehouse manager, supervised 25 employees, including Fitzpatrick and Coleman. He testified that he saw Coleman 3 or 4 weeks after the other employees had come back to work. On that occasion, truelove was summoned by a security guard at the south

[3] The above is based on the testimony of Donaldson and the thrust of the testimony of most employees who testified on this point, including particularly employee James Rannie. Maxwell testified that he told the employees that he did not approve of the procedure. However, he also testified that at a meeting of employees that night or the next day he told employees "to go on and fill out an application to the best of their ability, to try to keep harmony and let's get the people back to work." I believe that Maxwell was mistaken about what he told employees after his meeting with Donaldson and that his testimony about what he told employees at the union meeting was a more accurate reflection of what he told them at the plant.

[4] Some employees fell into more than one category. In most cases I have simply considered the one issue which I believed was dispositive of their case. Moreover, if I found that a particular employee was not entitled to reinstatement, I did not, in most cases, make an alternative finding of whether the individual did not make an adequate search for work so as to mitigate backpay liability.

[5] James Benton, Ruby Butler, Ozell Brown, Sam Cain, Jerry Ray Jefferson, Calvin Jerry, James Kegler, Garfield Powell, Dora Smith, James Smith, Carlton Wilson, Carl Zellers, James Barker, Chester Davies, Sam Evans, Robert Jones, Glen Kizer, Maurice Lee, L. C. Love, Robert Pittman, and Walter Williams. The Respondent also alleged that Barker, Pittman, and Williams had quit and that Barker had engaged in strike misconduct.

[6] The nine included Lucius Blair, David Powers, Rodney Lee Warren, Willie Boulton, William Clark, Robert Dickerson, Leroy Hughes, Mary Hunt, and Clyde Robinson. I have reviewed their testimony and I find that many clearly had no interest in returning to work for the Respondent and others implicitly indicated as much because they either knew from union officials or had the opportunity to learn from them the circumstances of the Respondent's reinstatement offer.

gate and told that Coleman wanted to speak to him. He spoke to Coleman. This was about 3 or 4 p.m. Coleman expressed an interest in returning to work. Truelove told him he would have to report to the personnel office. According to Truelove, no one else was with Coleman at this time and he did not report Coleman's appearance to personnel officials. Truelove denied speaking to Coleman on any other occasion. He was not informed of the February 1977 letter and had no role in the hiring or reinstatement process.

It is uncontested that Coleman did not present himself at the personnel office for reinstatement at any time.

John Fitzpatrick, another night-shift warehouse worker, also participated in the strike and learned of its conclusion on the radio. He denied that he picked up a strike benefit check at the union hall the week of September 27. However, it was stipulated that he received benefits for the week ending September 26, 1976. The evidence shows that the checks were picked up at the union hall in person and that the last checks were picked up during the week of September 27, 1976. Fitzpatrick thus had contact with the Union during the reinstatement process. He testified that he spoke to his supervisor Truelove about 9 a.m. 1 day after the strike ended. Coleman and one other person were present although they were behind Fitzpatrick when he talked to Truelove. Truelove said that the Respondent was not hiring. Fitzpatrick then left and never returned to the plant. Fitzpatrick admitted that, when he spoke to Truelove, he saw day-shift people at the personnel office "trying to get hired back."

Truelove denied ever speaking to Fitzpatrick and said that he did not see Fitzpatrick when he spoke to Coleman in October 1976. It is uncontested that Fitzpatrick never presented himself to the personnel office for reinstatement.

I credit Truelove's testimony that he told Coleman to report to the personnel office. Truelove's testimony was candid and it was clearer and more plausible than that of Fitzpatrick and Coleman. First of all, Truelove established a date and time for his conversation with Coleman. He normally reported for work in the afternoon. It would be unlikely that he would be present in the morning as Fitzpatrick and Coleman testified and it would be even more unlikely that the two night-shift employees would report at that hour if, as they testified, they felt that they should report to their supervisor instead of the personnel office. Secondly, it appears that both Coleman and Fitzpatrick were aware of the fact that employees were reporting to the personnel office. Their testimony seemed to be an attempt to explain away their failure to do so. Finally, I perceive no reason for believing that Truelove would have rejected these employees without referring them to the personnel office. The employees, on the other hand, gave evidence that their testimony was not reliable. Fitzpatrick denied receiving benefits the last week of the strike, but his testimony was refuted by stipulated facts. Coleman's testimony was ambiguous and his failure to report to the personnel office in response to the February 1977 letter specifying this approach is telling. I do not believe he even reported to Truelove at that time. The actions of both men seem to me to have been reflective of a lack of interest in returning to work for the Respondent.

For all of the reasons set forth above, I find that Fitzpatrick and Coleman did not properly present themselves to the Respondent for reinstatement.

b. *Jodie Culp*

Jodie Culp, who was a janitor prior to the strike, collected strike benefits every week and heard that the strike ended at a union meeting. When he picked up his last strike benefit check, he was told by union officials to report for work the next day, which would have been September 27, 1976. He did not do so. He testified that he did not go back to the plant until 2 weeks later after he called the plant and was told to report to Donaldson. When pressed as to why he did not report before then, he testified, "I don't know why I did that, but I didn't feel like going back right then, so I just, you know, waited awhile." He testified that he did subsequently return to the plant and talked to Donaldson about getting his old job back. According to Culp, Donaldson told him he had no job openings except for "a route job and that was too heavy for me." Culp was actually reemployed on March 7, 1977, after being sent a letter by the Respondent.

Donaldson denied ever talking to Culp and stated that his records did not show that Culp ever presented himself for reemployment until he was sent a letter in March 1977.

I credit Donaldson and find Culp's testimony unreliable. His testimony was not clear or precise. I believe he confused his return to work in March 1977 with an imagined interview with Donaldson in September 1976. Donaldson had no reason to omit such an interview, if it had occurred, from his notes. I also observed in Culp's testimony a lack of interest in returning immediately back to work after the strike. This lack of interest is consistent with Donaldson's testimony that Culp never did present himself for reemployment until March 1977.

In these circumstances, I find that, even though he had knowledge of the end of the strike and was in contact with the Union at this time, Culp did not present himself for employment in response to the Respondent's offer of reinstatement.

c. *Lloyd Prescott Jr.*

Lloyd Prescott Jr. was a forklift operator on the night shift. He participated in the strike. He heard that the strike was over at a union meeting and was told to report to the plant ready to go to work. He testified that he reported to the plant about 3 p.m. on Monday, September 27, 1976. He also testified that there were "quite a few guys" at the plant and that he got in line at the personnel office. According to Prescott, he reached the "lobby" of the personnel office and remained there for about 10 minutes. He subsequently testified that he had been at the plant for an entire hour. He did not sign his name to any log. He also testified that an individual whom he could not identify made an announcement that there were no positions for lift operators and that everyone who had badges and safety glasses should turn them

in. He also testified that after the statement he and the others in line turned around and left the premises. Prescott did not fill out an application and he could not identify any of the other employees in line with him. He did not return to the plant or report the incident to a union representative even though, according to Prescott, there were two present at the plant that day.

Donaldson testified that Prescott did not present himself for reemployment or sign the log indicating he had been at the plant. Donaldson testified that he made an announcement to a group of returning strikers about 3 p.m. on September 27 that he could not process everyone waiting in line and asked them to return the next day. He denied making any of the statements related by Prescott.

I do not credit Prescott's testimony concerning what transpired at the plant on September 27. I found Prescott's testimony confusing and unreliable. He could not identify any other employee who was present at the plant and who could corroborate him. His story about being asked to return safety glasses and badges is implausible and completely at odds with the accounts of other employees who reported for work that same day. If indeed he had been denied reinstatement in the manner he suggested, it is likely that he would have complained to the Union since the day before he had been told by union representatives to report to the plant. Yet he did not do so. Moreover, Prescott made no other effort to report to work even after the Respondent sent him a letter in early 1977 offering him work. He had changed his address without notifying the Respondent and thus did not even receive the letter. This tends to support the inference that Prescott did not present himself to the Respondent because he did not want to return to work.

In these circumstances, I credit Donaldson and find that Prescott did not present himself at the plant in accordance with the Respondent's offer of reinstatement.

d. *L. C. Sheffa*

Sheffa, a machine operator, participated in the strike. He learned that the strike was over from his sister-in-law. On direct examination he testified that he went to the plant "some time in 1977." He said he went to the plant and that "the people were going in" but that he did not go in to talk to Donaldson or any other official of the Respondent about a job. When asked why not, he said "I don't know why." He made no other effort to report to work although he was subsequently sent a letter offering him employment. Later, Sheffa testified that he went to work for another employer during the strike and simply stopped at the plant for a "few minutes and went back to my old job." He also said he left because the "line was so long." Sheffa never talked to any official of the Respondent about returning to work.

It is clear that, according to his own testimony, Sheffa did not present himself to return to work for the Respondent. In my view he did not do so because he wanted to remain on the job he had obtained during the strike. He simply stopped at the plant on the way to his new job. Sheffa thus did not comply with the Respondent's offer of reinstatement.

e. *James Rannie*

James Rannie was a maintenance employee on the day shift. He participated in the strike. He reported to the plant on the morning of September 27, 1976. While he was waiting to present himself for reinstatement, Union President Maxwell came out from his meeting with Donaldson and told employees to fill out the Respondent's application forms. According to Rannie, he stood in line from about 8:30 a.m. and until about 2 p.m., and, at that time, he was handed an application form by Supervisor Oscar Rapp in the doorway of the personnel office.

Rannie testified that he told Rapp he did not "feel like I had to fill the application out; and he told me if I didn't want to fill it out, to leave the premises. So I handed him back the application and left." Rannie never returned to the plant to ask for his old job back. He did receive a letter in February 1977 offering him reinstatement. But, even though he went back to the plant at this time "to pick up my pension plan," he did not inquire about the job offer.

I do not credit Rannie's testimony. First of all, his testimony about Oscar Rapp handing him an application and Rannie refusing to fill it out is suspect. In a deposition given in connection with a suit against the Respondent, Rannie testified that a lady handed him an application and that "they said I would have to fill out an application and start as a new person." He also testified that he intended to fill out an application "until I went back payday" and found out that there was a problem with the checks of strikers but not with those of replacements. The conflict between Rannie's testimony and his prior deposition casts doubt on the reliability of his testimony. Secondly, it is highly unlikely that Rannie would have stood in line for 5 hours, knowing for most of that time that he would have to fill out an application, and finally, at 2 p.m., refused to do that very act. Maxwell had appeared on the scene about 9 a.m. and told employees to fill out the applications. Moreover, it was stipulated that all individuals who were given an application were given a notice that the purpose of the application was to update the Respondent's records and that strikers were not being treated as new employees. Rannie testified he never saw such a notice and never signed the entry log which was a predicate for receiving an application form. It is thus likely that Rannie never received an application form.

Rannie's reliability is also put into question by virtue of his testimony concerning his employment at Gilco during the strike. He testified that he only worked sporadically at Gilco until 1977. Personnel records, however, indicate that he worked there full time in 1976, including the weeks of September 25 and October 2, 1976. This might well explain why Rannie did not persist in seeking reemployment with the Respondent. It is also clear that he did not follow up on the Respondent's February 1977 offer of employment because he was still then working for Gilco. He was apparently making as much or more at Gilco as he would have made in his job at the Respondent.

Donaldson testified that Rannie did not present himself for reinstatement and that Rapp did not stand outside his

office handing out application forms. Donaldson's secretary did so and she did so only after employees signed the log. Rannie did not sign the log.

In considering all of the evidence, including the unreliability of Rannie as a witness, I find that Rannie did not properly present himself for reinstatement.

2. The General Counsel's allegation that the Respondent's blanket offer of reinstatement was inoperative

The reinstatement right of 36 employees turns on whether the Respondent could properly require employees to present themselves at the plant, in person, on September 27, 1976, as set forth in the Respondent's telegram of September 21, 1976. The Respondent, relying on *Birmingham Ornamental Iron Co.*, 251 NLRB 814 fn. 1 (1980), argues that it could. The General Counsel, relying on *Matlock Truck Body & Trailer Corp.*, 248 NLRB 461 (1980), argues that it could not. I agree with the Respondent.

It is well settled that a union has the authority to make an unconditional offer to return to work on behalf of all strikers. It is also settled that an employer may properly make a collective offer to reinstate through the union, the striker's agent. Thus, by making such offer of reinstatement the employer collectively notifies the employees of the date they should return to work and satisfies its notification obligation. *Birmingham Ornamental Iron Co.*, supra, and cases there cited.

The Respondent relies on the *Birmingham* decision and asserts that it fulfilled its reinstatement obligation by reinstating returning strikers who presented themselves for reinstatement within a reasonable period of time after September 27, 1976, the date the Respondent set for the strikers to return to work. In *Birmingham*, the employer agreed to reinstate unfair labor practice strikers beginning on June 20 but it also decided that any striker who did not return by July 2 would be terminated under its rule that any employee who was absent for 3 consecutive days was treated as discharged. The employer refused to reinstate a striking welder who did not reclaim his job until July 10—8 days after the employer's deadline, even though it had hired two new welders between the deadline and the date when the striker presented himself for reinstatement. The Board found that the employer's failure to reinstate the striker who did not claim his job within the deadline was not unlawful. The Board noted that there was no evidence that the employer's offer was invalid or that the hiring of new welders was improperly motivated.

Birmingham teaches that an employer who responds to a collective offer to return to work on behalf of a group of strikers by accepting that offer and setting a reasonable reporting date makes a lawful offer of reinstatement. If an employee does not report for work within a reasonable time after such reporting date, he forfeits his job, absent a lack of good faith on the part of the employer. The rationale for this rule is clear. A union which makes a general offer to return to work on behalf of striking employees must be presumed to have their authority to act. If this offer is accepted by an employer who sets a reporting date for the return to work, without any agreement as to who is to notify the strikers, it devolves upon the union to notify them since it was the union which purported to act on their behalf in the first place. The facts in this case bespeak an even stronger rationale for such a rule because the Union not only met with the strikers before its return to work offer, but also had weekly contact with them when they picked up their strike benefit checks in person at the union hall every Friday during the strike.

I agree that, under *Birmingham*, the Respondent was entitled to treat employees who did not present themselves for reinstatement within a reasonable period of time after its specified reporting date as having voluntarily surrendered their employment rights. The Respondent set a reasonable reporting date 6 days after its acceptance of the Union's offer to return to work. In *Birmingham*, the employer had set a reporting date 2 days after the employees voted to return to work. Moreover, here, the Respondent kept its reporting date open. It took strikers back as late as October 4 and there is no evidence that it turned any strikers away if they presented themselves too late. There was thus no deadline imposed upon returning strikers. In *Birmingham*, in contrast, the employer did set a deadline, after which it "discharged" employees who failed to report. Accordingly, the Respondent here is not only in a stronger position than the employer in *Birmingham*, but its conduct of the reinstatement process demonstrates its good faith.

The General Counsel's efforts to distinguish *Birmingham* are unavailing. The General Counsel notes that in *Birmingham*, the employer imposed a 2-week deadline for strikers to return to work and then utilized a 3-day unexcused absence rule to discharge those who did not return. He contends, however, that this case is different because the Respondent sent out letter offers of reinstatement to some strikers 4 months later whether or not they presented themselves on the date set forth by it for their return. I fail to see how this fact makes *Birmingham* legally distinguishable from the case at bar or how it requires a finding of illegality in this case whereas the absence of such a fact requires the opposite result in *Birmingham*. The crucial factor both in *Birmingham* and in the instant case is that the employer imposed a reasonable requirement for the return of striking employees in conjunctinn with a lawful collective offer to reinstate on a date certain. The fact that the Respondent in this case went beyond what was required of it and sent individual letter offers to employees 4 months later really makes this case stronger than *Birmingham* and offers further evidence of the Respondent's good faith.

The General Counsel also asserts that in *Birmingham* there was no indication that any other striker was denied reinstatement while, in the instant case, he alleges that some 46 out of 115 employees who presented themselves were not reinstated for various reasons. This begs the question. The reasons for individual denials of reinstatement will be litigated in this or any other case in which the *Birmingham* defense is presented. The *Birmingham* defense is focused only on those employees who do not present themselves for work in response to a valid offer of reinstatement much as an employee who fails to re-

spond to a letter offer of reinstatement. Likewise inapposite is the General Counsel's argument that the Respondent did not displace any striker replacements to make room for returning strikers. The issue is not whether replacements were fired or retained, but whether strikers were properly offered reinstatement. The Respondent's treatment of replacements has no bearing on the failure of a striker to return to work on the date given by the Respondent or within a reasonable time thereafter. Finally, the General Counsel asserts that the Respondent treated the returning strikers as new employees, pointing specifically to the Respondent's requirement that they fill out new application forms. This again begs the question. For a person who does not show up to claim his job it does not matter how the employer treated those who did, unless there is evidence that those who did not show up did so because they were precluded from presenting themselves due to employer conduct which is found to be unreasonable or unlawful.

Absent specific evidence of adverse effect on particular employees,[7] I reject the General Counsel's general contention that the Respondent's requirement that returning strikers fill out application forms was tantamount to treating them as new hires. Initially, there is no allegation in the complaint that use of the applications as a general matter was violative of the Act. Presumably, the numerous employees who filled out applications and were returned to work did not suffer any adverse effect from the procedure. There is, moreover, no evidence that the Respondent utilized the application procedure to pick and choose which strikers to retain and did so based on union considerations. Nor were reinstated strikers denied their accrued seniority or otherwise treated as new employees. On the contrary, the Respondent specifically notified the returning strikers that they were not being treated as new employees and that they were being asked to complete new application forms only in order to update the Respondent's records. This was an understandable and reasonable requirement in view of the fact that the strike lasted some 14 months. The record shows that many employees had changed their addresses during that period of time and that some had medical or other problems which could have affected their ability to perform their jobs. Finally, this is not a case where the offer of reinstatement itself contains a reference which can be construed as an intention to treat strikers as new employees.[8]

Nor was the Respondent's sign-in and interview procedure unreasonable. The Respondent could hardly be expected to handle a great number of returning strikers without some orderly processing. Indeed, it appears that the Union grudgingly accepted the Respondent's procedure to process the number of employees who responded to the offer of reinstatement. The credited testimony shows that Union President Maxwell spoke to Donaldson about the use of the application forms and that he told employees to fill them out. There is also evidence that he told them to cooperate in acting in an orderly fashion in getting their jobs back. Considering all the circumstances, the Respondent's reinstatement procedure was fair, reasonable, and not discriminatory in any way.

In his reply brief, the General Counsel also cites, without much discussion, *Matlock Truck Body & Trailer Corp.*, 248 NLRB 461 (1980), in support of his argument that the Respondent's telegram of September 20 was only a "notification to strikers that they had to make personal application before they would be considered for reinstatement" and thus was a "rejection of the Union's original offer of reinstatement and an unlawful precondition for reinstatement." The case is distinguishable and the argument is without merit.

In *Matlock*, the Board adopted an administrative law judge's finding that, in the circumstances of that case, the employer "was wrong in requiring the strikers to make personal applications to return to work" in response to an unconditional collective offer by a union to return to work on behalf of the strikers. In *Matlock*, as here, the employer responded to a union's collective unconditional offer to return to work on behalf of strikers by offering reinstatement upon presentment of the employees at the plant. However, in *Matlock*, unlike in the instant case, the employer's offer was conditional: it offered to take back any striker "provided he has seniority and qualifications to entitle him to work . . . ." The clear implication was that the employer was going to pick and choose which strikers it was going to reinstate. Indeed, the employer in *Matlock* did not initially take any employees back to work when they presented themselves at the plant for reemployment. It merely collected names, addresses, and phone numbers of individuals who presented themselves and advised them they would be contacted later. A representative of the employer stated that it "needed some time to find out what their [sic] manpower requirements were, and to determine who had the seniority to go back to work." Four days later, the employer announced, in a letter delivered to the union, that it would only accept for reinstatement those who had presented themselves at the plant in the past 4 days and those who applied in the next hour and one half. The employer also indicated it would accept only those who had "sufficient seniority to justify immediate reinstatement." Accordingly, the Board found that the offer of reinstatement was a sham and that it would have been futile for strikers to respond to the employer's original offer after the unilateral imposition of an unreasonable deadline.

In the instant case the Respondent's treatment of returning strikers was not conditional or selective. The Re-

[7] To the extent that the General Counsel has made specific arguments that the application forms of particular employees were utilized to deny them reinstatement, I have considered these arguments in the determination of the legality of individual denials of reinstatement.

[8] The cases cited by the General Counsel to support a contrary position are distinguishable on these and other grounds. Thus, in *Standard Materials*, 237 NLRB 1136 (1978), the strike lasted only a few days and the employer insisted on conditions, such as taking physical examinations, which clearly showed it was treating the strikers as new employees and punishing them for engaging in the strike. And in neither *Mark Twain Marine Industries*, 254 NLRB 1095 (1981), nor in *Weather Tec Corp.*, 238 NLRB 1535 (1978), the case cited therein as authority, was there a disavowal, as there was here, of any intention to treat the returning strikers as new employees.

spondent's telegram of September 21, 1976, was a valid offer of reinstatement and satisfied its obligation to notify employees when they should return to work. The Union presumably spoke on behalf of all employees when it made an unconditional offer, on their behalf that they would return to work. The next day, the Respondent told the Union that it would take all strikers back and asked that they report on September 27. On that day and the next, the Respondent processed a number of former strikers who presented themselves at the plant. The Respondent continued to process and interview returning strikers through at least October 4, 1976. Even thereafter, the Respondent was prepared to hire returning strikers if they presented themselves at the plant and indicated an interest in returning to work. Several employees were rehired thereafter—well into 1977—after they were sent letters by the Respondent asking if they wanted employment. There was no deadline within which returning strikers had to report or forfeit their jobs. The evidence thus clearly shows that the Respondent held open its reporting date for reinstatement for more than a reasonable time after the reporting date it properly set for returning strikers in response to the Union's telegram stating that the strikers wished to return to work.

In these circumstances, I find that the Respondent acted in good faith and is not obligated to reinstate the 36 employees who failed to present themselves for work in accordance with the Respondent's offer of reinstatement.

C. *The Reinstatement of the Bottle Inspectors*

The General Counsel alleges that the Respondent's offers of reinstatement to five employees, Geneva Sheffa, Tinnie Mae Kones, Pearlie Turner, Linnie Shields, and Mary Evelyn Watkins, were improper because the Respondent failed to offer them their former jobs as bottle inspectors and instead offered them jobs as bottle sorters. It is undisputed that, when these five employees presented themselves for reinstatement, bottle inspector's jobs were in existence and occupied by strike replacements. The Respondent's position is that—as to all but Shields—its offer of a bottle sorter's position was temporary and, in any event, a substantially equivalent job. As to Shields, the Respondent alleges that it did indeed offer her a bottle inspector's position, but that she reported for work and shortly thereafter quit her employment. I consider first the situation of the four employees who were admittedly offered bottle sorter's positions.

It is settled law that an employer must reinstate unfair labor practice strikers to their former jobs upon their unconditional offer to return to work, discharging replacements if necessary. *Pease Co.*, 251 NLRB 540, 547 (1980), and cases there cited. Reinstatement must be to the employee's former job if it exists. See *Custom Craft Mfg. Co.*, 212 NLRB 255, 258 (1974). "The Board has long held that an employer can restore a discriminatee to a 'substantially equivalent job' only when the discriminatee's former job is no longer available." *Trustees of Boston University*, 224 NLRB 1385 (1976), enfd. 548 F.2d 391 (1st Cir. 1977); and see cases there cited. See also *Arcadia Foods, Inc.*, 254 NLRB 1012 (1980). Thus, as the Board has stated, "whether in [the employer's] opinion the jobs offered the employees were easier, less burdensome, or in some way equivalent makes no difference; they were not the same jobs, to which the employees had a right to reinstatement." *Custom Craft*, supra, 212 NLRB at 258.

In the instant case, it is clear that when bottle inspectors Sheffa, Watkins, Kones, and Turner presented themselves for reinstatement, their former jobs were in existence, although occupied by strike replacements. The returning strikers were thus entitled to those jobs even if replacements had to be discharged to make room for them. It makes no difference that the Respondent offered the bottle inspectors different jobs at the same pay.

The Respondent's contention that the two jobs were interchangeable and essentially the same is without merit. The record shows that a bottle inspector was paid more than a bottle sorter, presumably because of a difference in skill and responsibility in the two jobs. Basically, a bottle inspector checks bottles going through the line immediately before they are filled; a bottle sorter checks bottles at a much earlier point—before they have been washed—when they are dirtier. An inspector generally works in a seated position; a sorter does not. Inspectors are usually promoted from bottle sorter positions. Although bottle inspectors sometimes performed sorting work, such interchange was minimal. I must conclude that the two jobs are significantly different.

Thus, since bottle inspectors' jobs were in existence and since those jobs were different than bottle sorter's jobs, the Respondent's offer to former bottle inspectors of bottle sorter's jobs—albeit at the same pay—was not a proper offer of reinstatement. In these circumstances, a temporary reassignment is not proper. See *Arcadia Foods*, supra. Accordingly, Kones, Turner, Watkins, and Sheffa were entitled to reinstatenent as bottle inspectors.

Kones and Turner properly refused bottle sorter's jobs and were never recalled or reinstated. They are thus entitled to proper reinstatement and backpay.

Sheffa was actually reinstated in August 1977. Although she first took a bottle sorter's job, she was put on a bottle inspector's job 5 days later. The General Counsel seeks backpay for Sheffa from September 27, 1976, to August 1, 1977, when she was actually reinstated. The net backpay requested is $3821.

The Respondent contests the Sheffa backpay liability on two grounds. The first, which is presumably equally applicable to Kones and Turner, is that Sheffa willfully refused a job offer at the beginning of the backpay period which would have mitigated all of the Respondent's backpay liability: she refused a bottle sorter's job. The contention is without merit. An employer may not escape backpay liability by arguing that a returning striker should have accepted a job offer which was legally improper. As the Board stated in *Wonder Markets, Inc.*, 249 NLRB 294, 295 (1980):

> It is well established that where a discriminatee's former position is in existence as of the date of our order, the restoration of the status quo requires that the employer reinstate him to that position. Respondent in its motion has not offered any explanation for its failure to do so in Whitney's case. It

would be anomalous indeed for this Board to hold, as Respondent would have us do, that an employer must offer a discriminatee his former job where it still exists, in order to comply with its reinstatement obligation, while finding that the discriminatee nevertheless must accept an offer of another job which is not even substantially equivalent in order to mitigate lost wages—the ultimate penalty for such failure being, Respondent argues, forfeiture or substantial diminution, if not elimination, of further backpay.

Clearly, if a discriminatee is under no obligation to take a different job from the same employer because the offer thereof does not constitute a valid offer of reinstatement, he is certainly not required to take that job in order to mitigate lost wages and thereby reduce the employer's backpay obligation. Thus, Respondent's backpay obligation was not tolled or lessened by Robert Whitney's refusal of its job offer, an offer which Whitney was not legally required to accept.

Nor has the Respondent met its burden of showing that Sheffa was guilty of a willful loss of earnings. She testified that she found a part-time job and did domestic work after being denied reinstatement to her former job by the Respondent. She applied at Cleo Wrap, a local employer, and went to the Tennessee Department of Employment Security. She also talked to friends about possible job opportunities. The Respondent has not rebutted this evidence. Accordingly, Sheffa is entitled to the net backpay figure set forth in the General Counsel's specification.

In the case of Mary Evelyn Watkins, the evidence shows that, although she was entitled to a bottle inspector's job, she accepted a bottle sorter's job and worked from September 1976 until January 1977 when she left the Respondent's employment. The General Counsel's position on Watkins is that she was entitled to be placed in a bottle inspector's job and that she was harassed into quitting. I reject the General Counsel's contention. I find that Watkins waived any right to be placed on a bottle inspector's job and voluntarily quit her employment.

The evidence shows that when Watkins was reinstated, she was told by Donaldson that she would shortly thereafter be placed on a bottle inspector's job, her former position. It is undisputed that she was paid at a bottle inspector's rate of pay. However, she worked for 3-1/2 months in the bottle sorter's position. Donaldson claimed he had no idea she was not eventually placed in her former job. There is no evidence that, during the 3-1/2 months between her reinstatement and her termination, Watkins complained about her job assignment or asked to be put on a bottle inspector's job as promised. In these circumstances, I find that Watkins accepted her assignment to a bottle sorter's job voluntarily and waived any right she had to return to her old job. She certainly suffered no loss in pay.

The circumstances of her termination do not show harassment. They show instead that Watkins voluntarily quit her employment.

According to Donaldson's credible testimony, he was notified on January 12, 1977, by Watkins' supervisor that she was unable to keep up her production. Watkins complained about trouble with her hand. Donaldson instructed Watkins to see the Respondent's doctor Dr. Sam Evans and to report back after seeing him. This was in accordance with the Respondent's procedure when on-the-job medical problems or injuries occurred. Dr. Evans was on retainer to handle such cases. Watkins did not see Dr. Evans and did not report back to work. She did not report for work the next 2 days, Thursday and Friday. She returned to work on Monday, January 17, and presented a statement from a Dr. Byson which Donaldson did not accept because, in his experience, Dr. Byson's statements were unreliable. He never accepted statements from Dr. Byson. Donaldson again instructed Watkins to see Dr. Evans. She reported back on Wednesday, January 19, with a statement from Dr. Evans. She was told to report for work the next day, January 20. She then told Donaldson she was quitting and signed a termination slip to that effect.

Watkins' testimony is not seriously in conflict with that of Donaldson's, although it is not as clear or as detailed as that of Donaldson's. To the extent, however, that her testimony differs from that of Donaldson I do not credit it. In addition to its ambiguity, some of her testimony conflicted with a statement she gave to the Tennessee Department of Employment Security. I thus credit Donaldson's account of Watkins' last days of employment with the Respondent.

It is true that Watkins' problem first came to the attention of the Respondent when her supervisor reported to Donaldson that on January 12, 1977, she could not keep up with production. Watkins then mentioned the trouble with her hand. Thus, it is open to inference that the whole sequence of events leading to Watkins' resignation was related to the fact that Watkins was working as a bottle sorter on January 12 rather than a bottle inspector. In my view, however, the General Counsel had the burden of proving that the resignation was related to the Respondent's failure to properly reinstate Watkins. He has not done so. First of all, the evidence that Watkins worked for 3-1/2 months in the bottle sorter's job without complaining or requesting return to the bottle inspector's job constitutes a waiver of her right to the inspector's job. The Respondent had a right to expect Watkins to perform the job that she accepted and occupied. Moreover, the General Counsel has not shown that Watkins' productivity problem which may have been occasioned by Watkins' hand injury would not have been present had she been working in the bottle inspector's job. Indeed, quite the opposite is apparent since it might be expected that Watkins would have complained if her hand injury impeded her productivity on the sorter's job but would not have impeded her productivity on the bottle inspector's job. In any event, it was Watkins who actually resigned her employment after being told to report for work on January 20, 1977. In these circumstances, the Respondent is not responsible for offering Watkins further reinstatement or any backpay.

In the case of Linnie Shields, the Respondent asserts that she was reinstated as a bottle inspector. Donaldson testified that he interviewed Shields on September 27, 1976, reinstated her to a bottle inspector's job, and told her to report for work the next day. His testimony is supported by his notes and other documentary evidence. The Respondent's records showed that Shields was issued an ID badge and safety equipment, filled out her W-4 form on September 27, and punched in for work at 7 a.m. on Tuesday, September 28. On the other hand, Shields' testimony on the substance of her reinstatement interview is not reliable. She did not even recall being interviewed by Donaldson. She did not initially remember signing a log and filling out an application before being reinstated. She did remember these details when shown the documents.

Shields testified that she reported for work, but then told her supervisor, Mary Collins, that she was going into the hospital the following day. She testified she was assigned to making cartons, but that she never performed any work because Collins told her to go home and that Collins would put her "on the sick list." Actually, Shields' hospital records established that Shields did not enter the hospital until October 5. The Respondent's records show Shields did not work on September 28, although she did punch in that day. They also show a notation from Collins that Shields stated she "may need to go in hospital for a nerve condition" and "would prefer emp. at a later date."

Shields never returned to work. Nor did she contact Donaldson, according to his testimony. Shields testified that she called Collins after her hospitalization but that Collins told her she had no work for her. Her testimony on this point was confusing. Initially, she testified she did not talk to any one else, but later said that Donaldson called her the day after she talked to Collins. Her testimony that Donaldson asked her why Collins told her that her job would be waiting for her is incomprehensible.

My analysis of all the testimony as well as my assessment of Shields' demeanor convinces me that her testimony was not reliable. I credit Donaldson and give effect to the documentary evidence which supports his testimony. Accordingly, I find and conclude that Shields was reinstated to her bottle inspector's job, that she reported for work but did not actually perform any work, and that she left work because of illness and never returned to claim her job. She thus voluntarily resigned her employment and is not entitled to reinstatement or backpay.

D. *The Employees Who Allegedly Resigned*

The General Counsel alleges that several employees whom the Respondent claims resigned their employment are nevertheless entitled to reinstatement. I consider five employees in this category: Herbert Hamlett, Raymond King, Willie Jefferson, Willie Cathey, and Roosevelt Fuller. Hamlett quit before the strike began; the others quit during the strike. As discussed more fully hereafter, I find that all of the above employees quit their jobs voluntarily and their resignations were not caused, coaxed, or coerced by the Respondent.

1. Herbert Hamlett

Hamlett, a painter, worked from 3 to 11 p.m. He began working for the Respondent on June 16, 1975, about 3 weeks before the strike. He claimed he participated in the strike. The Respondent claimed he quit his employment before the strike began. I agree with the Respondent.

Donaldson testified that about 3:30 p.m. on July 3, 1975, he observed a disturbance outside his office. Hamlett and the other night-shift painter Ray Jeane were high and boisterous. They demanded their checks and insisted they were quitting. Donaldson directed that the men be paid and ordered them to leave the plant. Some time later, Foreman Joe Wilson was notified of the incident involving Hamlett and Jeane, who was his nephew. He came to the plant and observed that they were not working on the night of July 3, 1975. Several days later, in conversations with both men, Wilson confirmed that they had quit. The Respondent officially noted that the employees quit in a separation slip signed by Wilson on July 14, 1975.

Hamlett testified that he worked on July 3, 1975. He denied ever talking to Wilson about having quit.

After the end of the strike, Hamlett presented himself for reinstatement and spoke with Donaldson on September 27, 1976. Donaldson reminded Hamlett that he had quit on July 3. According to Donaldson, Hamlett acknowledged that he had quit. Donaldson told Hamlett that he would be contacted if he was needed. Hamlett denied admitting to Donaldson that he had quit. Donaldson's testimony is supported by contemporaneous notes he took during the interviews of returning strikers.

I credit Donaldson's testimony that Hamlett quit on July 3, 1975, and admitted as much in his September 27, 1976 interview. Donaldson's testimony is supported by that of Foreman Wilson who testified that Hamlett did not work on July 3 and that Hamlett and his coworker acknowledged that they had quit in separate conversations with him. It is inconceivable to me that both Wilson and Donaldson would lie about these matters. Hamlett's testimony, on the other hand, is not reliable. He testified that he reported *for work* on the *morning* of July 7 and joined the strike at that time. This is implausible since he worked the night shift. Moreover, his testimony reveals a propensity to exaggerate his lack of contact with Wilson in an effort to deny that he had ever acknowledged to Wilson that he had quit. Finally, Hamlett's testimony about when and in what circumstances he collected his paycheck on July 3—or at any time—was muddled. He testified he normally received his paycheck on Friday mornings and picked it up from the personnel office or from Wilson. He claimed he saw Wilson on July 3, but he did not elaborate as to how or when he received his paycheck on that day. Donaldson's plausible testimony is that the painters normally received their checks from the night warehouse manager at the end of their shift and that the checks reflected their work for the prior week.

In these circumstances, I find that Hamlett did not work, and, indeed, quit his employment on July 3, 1975,

4 days before the strike began. He is thus not entitled to reinstatement or backpay.

2. The facts concerning Raymond King, Willie Jefferson, William Cathey, and Roosevelt Fuller

Raymond King worked on the night shift and participated in the strike.

J. D. Crouch, the night-shift production supervisor, testified that he was King's immediate supervisor. He testified that he received a telephone call from King in August 1975 telling him that he was quitting his job. Crouch notified his superior about the call and signed a separation slip stating that King had quit. King denied making any such call.

King presented himself for reinstatement on September 28, 1976. According to Donaldson, he mentioned Crouch's report that King had quit in August 1975. King admitted that he called Crouch "but now wants to come back." Donaldson told King that he would notify him if he were eligible for rehire. Donaldson thereafter contacted James Wimbley, in accordance with the Respondent's policy on rehires, to see if Wimbley, the production supervisor and Crouch's superior, would recommend King's rehire. Wimbley said he would not and King was not rehired. King was subsequently rehired, upon the recommendation of Crouch, on August 5, 1977. He was fired for cause several months later.

King at first denied that Donaldson mentioned anything about his having quit during the September 28 interview. On cross-examination, however, after being shown his pretrial affidavit in which he stated that Donaldson did mention his having quit, King changed his testimony. He nevertheless denied ever having quit or having called Crouch to tell him that he had.

I do not credit King's testimony. I accept the testimony of Donaldson and Crouch, who impressed me as a candid and reliable witness. King's testimony on a very crucial matter was shown to be inconsistent with a prior statement given to the Labor Board. In addition, King's testimony concerning his search for interim employment was confusing and unreliable. In these circumstances, I cannot credit King's testimony, and I find, in accordance with the testimony of Donaldson and Crouch, that King notified the Respondent in August 1975 that he was quitting his employment.

Willie Jefferson testified that he participated in the strike. He testified generally that he picketed and handbilled and drew strike benefits since the strike began.

It is uncontested that Jefferson applied for reinstatement at the end of the strike. According to Donaldson, he reminded Jefferson that he had quit his employment over a year before. Jefferson acknowledged as much, but said that now that the strike was over he was applying for work. Jefferson's account of the conversation does not refer to such an acknowledgement. Donaldson ended the conversation by saying that he would call Jefferson if he needed him.

According to Donaldson, whose testimony I credit, Jefferson met with him on July 29, 1975, in the personnel office. Jefferson told Donaldson he did not "want to be involved in a strike situation" and that he was quitting his employment. Jefferson signed a separation slip and a slip indicating that he was receiving a refund of $45 that he had paid for company uniforms which he returned at this time.

Jefferson's testimony concerning this meeting is wholly unreliable. He claims he turned in his uniforms because he needed money, but denied that he resigned or that he signed any resignation slip. He claimed the signature was a forgery. Yet my comparison of Jefferson's signature with a known sample, together with his evasive demeanor on this point, convinces me that he did indeed sign the resignation slip. In addition, although much of Jefferson's testimony about his meeting with Donaldson was confusing, he did concede that he may have told Donaldson he was seeking other employment.

As a further explanation of why he would not have resigned, Jefferson testified that he was fired on July 7 when Donaldson told the strikers that if they did not report to work the Company would hire replacements and the strikers could consider themselves fired. This statement was allegedly made to about 400 strikers outside the plant gates. Employee Watkins testified to a similar statement. I note that no such allegation was made in the earlier litigation of this case. If such a statement were made it certainly would have been alleged in the earlier case, particularly since it was alleged, in that case, that two individual interrogations of strikers, who came to the plant to pick up their paychecks on July 14, violated the Act when Donaldson implied that strikers would be considered to have quit.

Donaldson credibly explained the statement to employees on July 7 as a request that employees report to work because the plant was operating despite the strike. He told employees that if they did not report to work, replacements would be hired. I credit Donaldson's testimony in this respect. It is understandable that employees testifying about Donaldson's remarks years after the event would be confused as to the exact words he used. And it is inconceivable to me that Donaldson, so careful in most of his encounters with striking employees, would have made the blatant threat alleged by Jefferson.

William Cathey testified that he participated in the strike. On July 22, 1975, about 2 weeks after the strike began, he crossed the picket line, turned in his hard hat and received a refund of $8.75. At that time he signed a deposit and refund card, as well as a separation slip indicating he had quit his employment. Cathey, who cannot read, testified that he was asked by an unidentified woman in the personnel office to sign the two documents before he could turn in his hard hat. He also testified that the documents were read to him before he signed them. He also testified that he decided to turn in his hard hat because "I didn't know whether I was going to go back to work there or not."

The evidence also shows that Cathey began working for the Press Manufacturing Company in March 1976 and worked there for 5 years. Cathey testified that he picketed and collected strike benefits after July 1975 and even after starting to work for Press. He picketed at night while working for Press in the daytime.

After the strike ended, Cathey applied for reinstatement. He spoke to Donaldson on October 4, 1976. Cath-

ey's testimony about this conversation was not clear. He testified that he could not recall whether he was told the Respondent would be in touch with him about a job. Donaldson testified that he referred to Cathey's separation slip and asked him if he remembered quitting. Cathey replied that he did, and stated he had gone to work for the Press Manufacturing Company. Donaldson told him that he would call him if he needed any more help. Donaldson testified he did not reinstate Cathey because he had quit his job and "had gone to work for another company." I credit Donaldson's clear account of this conversation.

Roosevelt Fuller testified by deposition on January 6, 1982. His doctor testified during the trial of this case that Fuller was medically unable to testify in a public trial. Accordingly, I permitted the parties to examine Fuller by deposition at his home.[9]

Fuller participated in the strike, picketed, and drew strike benefits throughout the period of the strike.

On September 12, 1975, about 2 months after the strike began, Fuller crossed the picket line and turned in his uniform to receive a cash refund from the Respondent. He stated he needed the money to pay some bills. He received a refund of $32. The Respondent submitted documents evidencing both the refund and Fuller's separation slip which indicated he had quit. Fuller's signature appears on the separation slip. Fuller denied he had signed the slip and that the signature on the slip was his. A comparison of the signature on the separation slip with a sample of Fuller's signature, however, convinces me that Fuller did indeed sign the separation slip. Furthermore, Fuller testified that he did sign a document when he claimed his refund, presumably the deposit and refund statement. However, that statement, which is in evidence, does not contain a signature. The separation slip does.

Fuller presented himself for reinstatement after the end of the strike. Donaldson informed him that he had a separation slip indicating that Fuller had quit. The slip had also been signed by Supervisor Oscar Rapp. Donaldson spoke with Rapp and confirmed that Fuller had quit. Donaldson did not reinstate Fuller because he considered Fuller as having quit his employment. Fuller testified that he could not remember very much about the conversation, but denied Donaldson said anything about his having quit. Fuller also testified that he called and talked with Donaldson by telephone. Donaldson testified he never had any such contact with Fuller. In view of the consistency of Donaldson's handling of employees who had signed separation notices, his otherwise clear testimony, and Fuller's lack of recall and his obvious effort, contrary to fact, to deny his ever having signed the separation notice, I credit Donaldson's testimony concerning this conversation.

3. Conclusion as to King, Jefferson, Cathey, and Fuller

It appears that in determining whether strikers resigned from their jobs during a strike such as to preclude them from reinstatement at its conclusion the Board utilizes the same presumption that attaches when a striker's election eligibility is at issue: the party challenging the employee status of a striker must "affirmatively show by objective evidence" that the striker has abandoned an interest in his struck job. See *Harowe Servo Controls*, 250 NLRB 958, 964 (1980). Neither an employee's acceptance of other employment nor his resignation in order to accept other employment will automatically establish an intent to abandon a striker's original job. "The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis." Ibid, quoting from *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359–60 (1962). And see *Coca Cola Bottling Co.*, 232 NLRB 794, 811 (1977).

Although resignations in order to accept other jobs during a strike do not automatically eliminate a striker from being considered for reinstatement, where the resignations are voluntary and neither coerced nor caused by an employer's misconduct, the employer may rely on such resignations and conduct his business affairs accordingly. See *Beverage-Air Co.*, 185 NLRB 168, 170 (1970); *P.B.R. Co.*, 216 NLRB 602 (1975); and *Mississippi Steel Corp.*, 169 NLRB 647, 663 (1968).

In the instant case, the Respondent has satisfied its burden of rebutting the presumption that strikers remain employees during the course of the strike by showing that King, Jefferson, Fuller, and Cathey freely and voluntarily resigned their employment. The resignations were objectively established by credible evidence.

In these circumstances, it was incumbent on the General Counsel to prove that the resignations were not what they appeared to be. This has not been done. There is no evidence that the resignations were coerced or caused by the Respondent's misconduct. The employees resigned during the first few weeks or months of the strike. All initiated contact with the Respondent. One did so by telephone, giving no reason for his action. Three others actually crossed the picket line. They turned in equipment connected with their jobs and obtained refunds for its return. All three signed separation slips indicating they had quit. There was no evidence that the Respondent required them to quit in order to obtain their refunds. Donaldson testified credibly that strikers were allowed to obtain refunds without resigning. Perhaps the employees felt they were required to resign in order to receive the money. This was not, however, due to any requirement or conduct of the Respondent. The employees willingly and freely resigned in order to receive the funds. Thus, in none of the resignations was it shown that the Respondent caused the resignations by "subterfuge," disparate treatment, or any other misconduct which would defeat the resignations. See *Beverage-Air Co.*, supra.

There are two pieces of evidence which might tend to show that the employees did not intend to abandon their jobs. First, they apparently picketed after the date of their resignations and collected strike benefits for that picketing. However, this evidence does not rebut the clear and convincing evidence of freely given resignations. The record herein shows that strikers were re-

[9] I hereby grant the General Counsel's motion to reopen the record to receive into evidence the deposition of Roosevelt Fuller.

quired to picket in order to receive strike benefits. The action of picketing is thus as consistent with a desire to receive remuneration from the Union as with a desire to retain employment. This is particularly true in Hamlett's case because he resigned even before the strike began. Moreover, the testimony of all the employees, whom I discredit on crucial issues, indicated only in general terms their continued picketing beyond the dates of their resignations. Such testimony—like denials that employees intended to quit or to abandon their employment—is self-serving and not particularly reliable. What is required to defeat the clear evidence of resignation in this case is some notification, either direct or implicit, to the employer that the resignations were not effective or had been rescinded. No such evidence is present here. The employees did not notify the Respondent of a change of heart—indeed all denied the obvious, that they had resigned in the first place. Nor was the Respondent made aware—through knowledge of their picketing, for example, that the employees' resignations should not be taken at face value. Finally, the resignations in this case were not shown to be conditional, for example, as they would be if given only because the employees believed resignations were required in order to obtain other employment.[10]

The second piece of evidence which might arguably negate the resignations is the application for reinstatement itself. This evidence is hardly persuasive. The strike lasted some 14 months. The employees quit early in the strike; one quit before it began. It would be tempting for a former employee to attach himself to an offer of reinstatement at the end of an unfair labor practice strike in order to obtain employment. But such action does not change the character of the resignation at the time it was made. There is nothing in this record which would negate the inference that the employees who quit during the strike quit because they were fed up with the strike or willing to resign in order to obtain a refund of their equipment allowance. To permit them to change their minds at the end of the strike would unduly penalize the employer who relied on those resignations in planning his work and in hiring new employees. Indeed, these new hires should not be terminated in order to accommodate enployees who now claim they did not mean what they said when they resigned.

The General Counsel also alleges that the Respondent engaged in misconduct which somehow "estopped" it from claiming that the resignations were what they seemed to be. First of all, the General Counsel cites a statement attributed to Donaldson on the first day of the strike by employee Jefferson that strikers would be fired if they did not return to work. I have discredited Jefferson on this point and credited Donaldson. In any event, it was not shown that any of the employees who quit relied on this statement. Indeed, Jefferson tried to deny that he resigned by claiming that he had been fired. The General Counsel also refers to a violation found in the original case that the Respondent unlawfully interrogated two employees in the context of an implication that strikers would be considered as having quit. However, the General Counsel does not explain how this finding affected the resignations of the employees involved here. Moreover, the General Counsel's reference to findings made by the Board in the earlier case that two other employees, Lambe and Rainey, were discriminated against in the context of their having quit is unavailing since those situations are distinguishable. In one situation, the Board found that the Respondent failed to act on Rainey's request for reinstatement during the strike until such time as he quit. The Board found that had the Respondent "acted in good faith," Rainey "would have promptly been reinstated" before being "compelled to quit." Here, the employees quit voluntarily well before asking for their jobs back at the end of the strike. In the second situation, the Board simply found that the Respondent discriminatorily terminated Lambe because he went out on strike. The facts of that case are so distinguishable from this that the differences simply strengthen the findings I make herein. The Board found that Lambe did resign, but that, 15 minutes after having left the Respondent's premises, he called Donaldson and asked that he be considered to have been discharged. That same day he asked for his job back. The Respondent refused to take him back in circumstances that suggested a discriminatory motive.

The General Counsel's real position on the employees who resigned is revealed by this passage in his brief: "Respondent is the wrongdoer in the instant case. Accordingly, Respondent should not be permitted to benefit from its unlawful conduct which place [sic] in the minds of its employees that engaging in the strike was tantamount to quitting." No elaboration of this position is offered. But surely findings of the sort suggested by the General Counsel cannot be made without a showing that the employees who resigned did so because of some specific piece of evidence which led them to believe that the Respondent treated all strikers as having quit their employment. There was no such evidence. Indeed, the employees denied they had quit. The General Counsel cannot substitute blanket condemnation for specific evidence. No one forced these particular employees to initiate the contacts with the Respondent which led to their resignations.

Accordingly, I find that, as in Hamlett's case, employees King, Jefferson, Cathey, and Fuller forfeited their right to reinstatement and backpay by freely and voluntarily resigning during the course of the strike in the absence of any evidence that the resignations were coerced or caused by the Respondent's misconduct.

E. *Alleged Improper Reinstatements*

This category involves a group of employees whose reinstatement rights turn solely on the facts. The General Counsel has alleged that three employees, Blaine, Smith, and Gatewood, were not properly reinstated and that nine other employees did not refuse offers of reinstatement to their former jobs as the Respondent alleged. There is a conflict in testimony as to what transpired in the reinstatement interviews and thereafter. In all cases I

[10] Even in this situation, however, it seems desirable to require the employees to make known to the struck employer that their resignations were required by their new employer.

have credited Donaldson's account of what happened and I sustain the Respondent's position as to all 12 employees.

I also include in this category a 13th employee, Roosevelt Lewis, who did not testify in this proceeding and whom the General Counsel did not discuss in his brief. I have sustained the Respondent's position that Lewis was not entitled to reemployment when he presented himself for reinstatement on October 4, 1976.

1. Everett Blaine

According to Donaldson, Everett Blaine, a machine operator on the first shift, was reinstated to his old job during an interview on September 27, 1976. Blaine told Donaldson that he had been working part time for Gilco Warehousing Co. Blaine did not tell Donaldson he was presently employed by Gilco. In fact, documentary evidence reveals that Blaine began working full time for Gilco on April 20, 1976, and worked there continuously until his interview with Donaldson and thereafter.

According to the testimony of Donaldson, Blaine reported to work the day after his interview and worked until October 5 when he was sent to Donaldson's office by his supervisor because he was 1-1/2 hours late. While Donaldson was arranging a conference between himself, Blaine, and the supervisor, Blaine left the lobby of Donaldson's office where he had been sitting. Blaine did not again report for work until October 13 when he came into Donaldson's office and stated he was quitting because "there [was] too much pressure." Blaine did not explain what he meant.

The General Counsel, relying on the testimony of Blaine, claims that Blaine was not properly reinstated as a machine operator, but was instead forced to perform cleanup work and that he was thereafter constructively discharged because President Pidgeon threatened him and because he was being followed around the plant by an unidentified person. The General Counsel's contention is completely without merit because Blaine's testimony is patently unreliable. First of all, Blaine misrepresented his employment situation to Donaldson in their interview. He claimed he had been laid off from Gilco. In fact, when he sought reinstatement and thereafter he was working full time for Gilco. His resignation is explained by the fact that he was trying to hold down two jobs after September 28, 1976, not because of any harassment from officials of the Respondent. Blaine's testimony that he was threatened by Pidgeon and followed around the plant by an unidentified employee is preposterous. My analysis of his testimony is as follows: During the reinstatement interview, Donaldson mentioned to Blaine a report he had received that Blaine had followed Pidgeon during the strike. Blaine embellished this report and projected onto Pidgeon the charges that had been made against him, including a charge that Pidgeon was packing a gun when he gave Blaine a menacing look in Donaldson's office. Blaine's testimony that he was not properly reinstated is likewise unworthy of belief. His timecard shows that he was given a chest x-ray, as were all machine operators during the last week in September. In addition, Blaine's suggestion that he was improperly assigned cleaning duties is not determinative of a failure properly to reinstate. Donaldson credibly testified that machine operators do cleanup work as a part of their regular duties. In these circumstances, I find that Blaine's testimony is beyond belief. I also find that the Respondent properly reinstated Blaine and that he voluntarily quit his employment. He is thus not entitled to reinstatement and backpay.

2. Bennie Smith

It is uncontested that Bennie Smith, a route helper, was reemployed on September 27, 1976, the day he reported for reinstatement. According to his timecard, he worked that day from 12:48 to 3:30 p.m., the normal quitting time. The next day he worked a full shift. Smith did not work on Wednesday, September 29. Smith called in late because of car trouble but never reported for work. He never thereafter reported for work and was discharged for three unexcused absences without notification, grounds for dismissal under the Respondent's rules. Smith reported to the personnel office on October 12 to collect his paycheck and sign his termination slip.

The General Counsel, relying on the testimony of Smith, contends that he was not properly reinstated to his former position and that he was improperly discharged on September 29. I reject this contention. First of all, Smith's own testimony makes it clear that the work he performed after his reinstatement was the same as that he performed before the strike. Thus, prior to the strike, he was assigned to stacking orders and other work at the plant, in addition to stacking cases on a route. For 3 hours on his first day back he was assigned to work in the shell lot. The next day he filled orders for outgoing trucks. Simply because, in the 1-1/2 days he worked, he did not go out on a route does not mean he was not properly reinstated. He was reinstated, according to Donaldson, as a route helper and his duties after the strike were consistent with the duties in that job classification. Smith did not work long enough to be sent out on a route, but there is no evidence that he was reinstated to a different job than that which he occupied before the strike. Accordingly, Smith was properly reinstated.

Nor has the General Counsel shown that Smith was discharged on September 29 and that the discharge was discriminatorily motivated. Smith testified that he called Supervisor Oscar Rapp shortly before 7 a.m. on Wednesday to tell Rapp that he would be late for work. According to Smith, Rapp made arrangements to put Donaldson on the line and Donaldson asked if Smith was "one of the strikers." Donaldson then told Smith that if he could not get to work he could not use him. Donaldson denied talking to Smith on this occasion. He also testified that it was impossible under the Respondent's telephone system for Rapp to call Donaldson while Smith remained on the line. I credit Donaldson because I believe his testimony that he would never get involved in the matter of a helper's call reporting his tardiness. Smith's testimony seemed to me to be strained and exaggerated. Nor would Donaldson's words, even as reported by Smith, lead a reasonable person to believe he had been discharged. Smith was simply late and could have reported for work either that day or the next. In these circumstances, I reject

Smith's testimony and find that he quit the Respondent's employ voluntarily. Since Smith was properly reinstated and thereafter voluntarily quit his employment, he is not entitled to reinstatement and backpay.

3. Vannie Gatewood

The circumstances surrounding Vannie Gatewood's reinstatement are in dispute. Gatewood testified that after some discussion with Donaldson on September 28 Donaldson told him that he would call him if he needed him. Donaldson testified that Gatewood told him he was living with his mother in Byhalia, Mississippi, and that he could not come to work until Thursday, September 30, because he was having his car repaired. Donaldson reinstated Gatewood and ordered him to report to his old job on Thursday. Gatewood did not report on Thursday or any other day. According to Gatewood, he called Donaldson on three different occasions, talking to Donaldson on two of those occasions. Donaldson told him he would call him if there were any openings. Donaldson denies that he ever talked with Gatewood after their September 28 meeting.

I credit Donaldson's testimony which is supported by the fact that, on his application, Gatewood listed his mother's address in Byhalia, Mississippi. Gatewood denied he was living there at the time of the interview and testified he was living with his brother about 1-1/2 blocks from the plant. This was indeed the address listed on his previous employment form and where he had lived before the strike. However, on his application completed in September 1976 he listed a different address and indicated he had his own transportation to work. It was thus reasonable for Donaldson to inquire about these matters and equally reasonable to infer that Gatewood countered with the statement that his car would not be ready and he would not return to work until Thursday. This is supported by Donaldson's notes of the conversation. Gatewood's attempt to explain why he listed a Byhalia address on his application when, according to his testimony, it was in error was contorted. Gatewood also testified that he had received strike benefits throughout the strike when undisputed evidence showed he did not. Nor do I believe that Gatewood called Donaldson after the interview. Gatewood did not impress me as a reliable witness. Accordingly, I reject his testimony and find that he was properly reinstated, but voluntarily quit his employment by not showing up for work. He is thus not entitled to reinstatement and backpay.

4. Roosevelt Lewis

Roosevelt Lewis did not testify in this proceeding and the General Counsel did not submit any evidence concerning the alleged failure to reinstate him. Nor did the General Counsel specifically brief any issues involving Lewis.

According to the testimony of Donaldson, Lewis, a general laborer, participated in the strike. He presented himself for reinstatement on October 4, 1976, and signed the log on that date. He was drunk at the time and was unable to communicate with Donaldson. Donaldson told him to come back later when he was sober. A short time later, Donaldson found Lewis in the lobby of the personnel office sleeping at a desk. Donaldson woke him and asked him to leave the building.

Lewis made no further effort to report for work until he received a letter from the Respondent. He returned to work on January 24, 1977.

The General Counsel originally asked for backpay for Lewis from September 27, 1976, until January 24, 1977. I assume that the General Counsel has dropped Lewis from the case. If not, I make the finding that the Respondent satisfied its obligation to reinstate Lewis. He did not present himself for employment ready to work. It was his responsibility to return to work in a sober condition. He did not. Nor did he attempt thereafter to return to work until he was notified by the Respondent in January 1977. Accordingly, Lewis is not entitled to any backpay.

5. Walter Fletcher

Walter Fletcher was a general laborer in the warehouse working on the night shift. Although Fletcher testified that he was an order filler in the warehouse, it is clear that he also worked on the omega dock. Both jobs were essentially the same and I accept Donaldson's testimony that a warehouse worker in the general laborer's classification was expected to perform both jobs. Before the strike Fletcher earned $2.55 per hour, plus a 20-cent differential for night work.

On September 28, 1976, Fletcher presented himself to Donaldson for reemployment. Although there is a conflict in testimony as to exactly what was said, it is clear, and I find, that Fletcher asked for a production or lift operator's job, neither of which he held before the strike. This is reflected on the application form he filled out. It is also supported by Fletcher's testimony on cross-examination. Fletcher had a job with another employer, Cleo Wrap, when he talked to Donaldson, and he testified that he wanted the production or lift operator's job because it would have been a better job than that at Cleo Wrap. According to Donaldson, whom I credit, he offered Fletcher a night-shift warehouse job at $2.75 which was the rate in effect at that time for such job. Fletcher had offered to work the production or lift operator's job at $2.75, a rate less than the rate at which these jobs were paid. Donaldson declined to offer Fletcher the higher rated jobs and Fletcher refused the warehouse worker's job.

The General Counsel claims that the Respondent offered Fletcher less than he would have been making at his old job, relying on Donaldson's notes which, at one point, stated that Fletcher's old pay was $2.55. Donaldson explained that the notation was an error; he stated that this figure was based on old payroll records. Actually, the pay rate for day work before the strike was $2.55; after the strike it was $2.75. Donaldson consistently offered the updated pay rate to returning strikers. His testimony makes it clear that he offered Fletcher the appropriate rate, $2.75, for the warehouse worker's job. The evidence also shows that Fletcher rejected the job because he wanted a better one.

In these circumstances, I find that Fletcher declined a proper offer of reinstatement on September 28, 1976, and is thus not entitled to reinstatement. In any event, the evidence also shows that in February 1977, Fletcher was rehired and at the time of the hearing he was still working for the Respondent. Fletcher had been laid off from Cleo Wrap in December 1976 and he admitted that he did not thereafter seek employment elsewhere because he was waiting to be recalled by the Respondent. Accordingly, I make the alternative finding that, even if my finding that Fletcher refused a proper offer of reinstatement is in error, Fletcher is not entitled to backpay of $600 for the first quarter of 1977, as alleged by the General Counsel, because he did not make any search for employment after he was laid off from Cleo Wrap.

6. George Dickerson

George Dickerson worked as a route helper before the strike. He applied for reinstatement at the end of the strike. At the time, he was working as a bus driver for a local board of education. There is a conflict in testimony as to what Dickerson said about his bus driver's job during his interview with Donaldson. Dickerson testified that he told Donaldson that he liked his bus driving job and asked if he could remain on the job for a week to train a replacement. Donaldson declined his request. Donaldson testified that Dickerson requested employment only if he was laid off from his bus driver's job. Donaldson told him he could not keep a job open for him. Dickerson then said he was not ready to leave his bus driving job.

I credit Donaldson. Dickerson's testimony was not reliable. He subsequently left the board of education job and joined the military. After his release from the military he filed a claim for reemployment rights with the Respondent, alleging that he had joined the military while still on strike. This was of course not true. Thus, Dickerson attempted to obtain reemployment rights based on false charges. His entire testimony was infected by the same unreliability. This is illustrated by a conflict between his testimony and that of his brother concerning when George told his brother when the strike had ended. Donaldson's testimony, on the other hand, was supported by his notes, as well as the thrust of Dickerson's own testimony: he liked the board of education job. It is likely that Dickerson acted and spoke as Donaldson testified. He turned down immediate reemployment because he wanted to continue to work for the board of education. He is thus not entitled to reinstatement and backpay.

7. Alvin Johnson

Alvin Johnson was employed before the strike as a general laborer. He reported for reinstatement on September 27. On his application, he stated that he was a machine operator. This was not his job before the strike. Donaldson corrected Johnson and told him he was classified as a general laborer. According to Donaldson, he offered Johnson a general laborer's job, but Johnson refused it and insisted on a machine operator or machine mechanic's job. This job paid $3.15 at the end of the strike, somewhat more than the $2.75 rate for a general laborer's job.

Johnson's testimony differed from Donaldson's. He claimed he did not refuse a general laborer's job and did not insist that he would only accept a machine operator's job. I reject Johnson's testimony. I believe Johnson exaggerated his prestrike responsibilities in order to justify a machine operator's offer. He acknowledged that Donaldson told him his former position was in the general labor category. In these circumstances, it is much more likely that the conversation went as Donaldson testified rather than as Johnson did. Johnson refused to work at his old job and insisted on a different job at a higher rate of pay. Accordingly, he is not entitled to reinstatement or backpay.

8. James Watson

James Watson was a forklift operator before the strike. There is a conflict in testimony as to what was said in the interview between Watson and Donaldson at the end of the strike. Watson testified that Donaldson told him he did not have a forklift job open, but that he offered Watson a job in the omega department which Watson initially accepted. Thereafter, Donaldson told him he had better not be "one damn minute late" or he would be fired. According to Watson, he refused to accept the job on those conditions and walked out of Donaldson's office.

Donaldson testified that he assigned Watson to a forklift job at the omega dock. Watson refused the job, insisting that he wanted a forklift driving position in the production department. Donaldson testified that he offered Watson the same job he had before the strike.

I credit Donaldson. His testimony was supported by his notes. Watson conceded that he could not remember the details of what transpired in his talk with Donaldson and he was not altogether clear in his testimony. He did, however, acknowledge that forklift drivers regularly work all over the plant and that he himself had driven a forklift in the omega department.

Accordingly, I find, in accordance with Donaldson's testimony, that Watson refused a valid offer of reinstatement and is not entitled to reinstatement and backpay.

9. Jessie Pearson

Jessie Pearson was a day-shift forklift driver prior to the strike. At his reinstatement interview, according to Donaldson, he was offered a day-shift forklift driver's job at $3.25 per hour, the existing rate for Pearson's old job. This was despite the fact that Pearson had indicated on his application that he wanted $3.50 per hour. Pearson said that he would take the job, but he refused to work for less than $3.45 per hour. Donaldson explained that Pearson was in effect asking for the 20-cent-night-shift differential for a day-shift job. Pearson refused to accept his old job at $3.25 per hour.

Pearson denied that Donaldson offered him the job at $3.25 per hour, but he did concede that Donaldson told him the rate for forklift drivers was $3.25 per hour and that he discussed with Donaldson his desire to earn $3.50 per hour. He also testified that Donaldson told him that

he had no openings available at that time and that Pearson would be called if a position became available. Pearson testified that he called the Respondent several times thereafter but received no job offer and was told by Donaldson to "keep checking back."

This is a close question on credibility. However, I must credit Donaldson because I cannot believe that he would have told Pearson that he had no openings while at the same time engaging in a discussion as to whether a forklift job paid $3.25, $3.50, or $3.45 per hour. Moreover, Pearson's testimony that the interview ended with Donaldson stating that he would call Pearson if there was an opening is a bit inconsistent with his further testimony that he subsequently continued to call the Respondent. Indeed, Pearson represented that Donaldson told him on one of these occasions to continue calling. This testimony does not seem plausible. In these circumstances, I conclude that Pearson rejected a valid and proper offer of reinstatement because he wanted more money. He is thus not entitled to reinstatement and backpay.

10. Calvin Pearson

According to Donaldson, he offered Calvin Pearson his old route helper's job at the $2.75 rate appropriate for that job in September 1976. Pearson refused the job and insisted on being paid $3.50. Pearson initially testified that he asked Donaldson for his old job but that Donaldson told him he would get in touch with him. According to Pearson, he received a letter from the Respondent offering hin a job a few days later. Actually, he was reinstated to his former job after being sent a letter offer from the Respondent in February 1977.

Pearson's testimony was completely unreliable. In addition to his erroneous view of when he was actually rehired, Pearson's testimony about the substance of his conversation with Donaldson was inconsistent. He concededly did ask for $3.50 on his application, thus tending to confirm Donaldson's testimony that he insisted on this rate in their discussions. More telling, however, was his testimony that Donaldson did indeed tell him that he could return to his position at "the same wage." In these circumstances, I credit Donaldson's testimony that, in September 1976, Pearson turned down a valid job offer and was not thereafter entitled to reinstatement or backpay from September 1976 until February 1977 when he actually returned to work for the Respondent.

11. Mose Scott

It is uncontradicted—because Scott did not testify—that Donaldson offered Scott his old general laborer's job at $2.75 per hour, the proper rate for the job. Scott demanded $3.15 and claimed he had been paid at a machine operator's rate. Scott had been paid $2.55 per hour before the strike; after the strike the rate was $2.75. Scott turned down his old job at the appropriate rate. Accordingly, Scott, who was returned to his old job in January 1977, was not entitled to reinstatement in September and is not entitled to any backpay.

12. Julius Fason

Before the strike, Fason was a night-shift general laborer. After the strike, he presented himself to Donaldson to return to work. Donaldson testified that he offered Fason his former job, but that Fason said that he had to work the day shift. Fason refused to accept the offer. Donaldson's testimony is supported by reference to his notes and also Fason's application in which he stated he was applying for first shift work. Fason's testimony about the interview is not reliable. He could remember little about the interview. He could not recall with whom he spoke, but testified that he was told he no longer had a job. He also testified he would prefer to work on the day shift. Fason's testimony is not only internally inconsistent, but seems to support Donaldson's testimony that Fason wanted to work on the first shift. Fason subsequently received a letter offer from the Respondent to return to work and he actually returned to work for the Respondent in January 1977.

In these circumstances, I credit Donaldson's testimony and conclude that the Respondent satisfied its obligation to Fason by offering him his old job in September 1976. He turned it down and is thus not entitled to backpay from September 1976 until January 1977 when he actually returned to work for the Respondent.

13. Carl Brown

Carl Brown was a general laborer prior to the strike. He reported for reinstatement on October 4, 1976. Donaldson testified that he reinstated Brown to his former job and told him to report the following morning. According to Donaldson, Brown came into his office the next day at 12 noon and requested a separation slip and his vacation check. He told Donaldson that he was leaving the city and would not be returning to work. Donaldson told Brown to check back on Friday for his vacation check since he would have to consult the Respondent's counsel on the matter. Brown turned in his equipment and received a refund, but he did not sign the separation slip which was nevertheless processed on October 5, 1976, the same date Brown received his refund. Brown did not return to the plant to receive his vacation check.

Brown testified that Donaldson told him, at his interview, that he had no job openings. Brown then told Donaldson that if there were no openings he would leave town to try to find a job. Brown also testified that Donaldson handed him a piece of paper, but that he was so angry that he did not look at it and threw it away. He also testified that 2 weeks later he returned to the plant to ask Donaldson for work. He was told there were still no openings. Brown asked for his vacation check but Donaldson told him that the Respondent's attorney ruled that he was not entitled to a vacation check. He also testified that he left Memphis in mid-October 1976 and stayed away for about 2 years.

I credit Donaldson's testimony which was clear and straightforward and supported by documentary evidence, including his notes. Brown's testimony was not clear and coherent. For example, at one point, he testified he called Donaldson several times after October 4 starting 1 week or 2 weeks later. Yet he admitted leaving Memphis

in mid-October. In short, I find that Brown was actually reinstated, but quit his job almost immediately. He is thus not entitled to reinstatement and backpay.

The General Counsel asserts that the Respondent unlawfully held some of the employees mentioned above to the wage rate they listed as desirable on their application forms which was higher than the existing rate for the jobs they held at the beginning of the strike. In support of his position, the General Counsel cites *Decker Foundry Co.*, 237 NLRB 636, 639 (1978), which suggests that such conduct is improper. Neither the argument nor the case cited in support thereof are persuasive.

First of all, Donaldson credibly testified that he did not hold the employees to the amount stated on their applications. My findings reflect that, in each case, the employees refused proper offers of reinstatement and insisted on different jobs at different rates after Donaldson explained the availability of their old jobs at their old rates of pay as adjusted for interim increases. These findings were based on what was said by each participant in the conversations between them and Donaldson as well as my assessment of the credibility of the witnesses, including their demeanor on the witness stand. The *Decker* case is thus distinguishable on its facts.

Moreover, here, unlike in *Decker*, the individuals presenting themselves for employment were not making initial offers to return to work. Such offers had been made a week before by the Union and had been accepted by the Respondent. Thus, the instant case does not present the issue considered in *Decker*, namely, whether offers by the employees to return to work were conditional. Here, the evidence persuasively revealed that a number of employees refused the jobs offered to them and insisted on jobs different than those they had occupied before the strike.

F. *The Employees Denied Reinstatement for Medical Reasons*

Five employees were denied reinstatement basically for medical reasons. The Respondent claims that during the reinstatement interviews Donaldson was alerted to medical problems and he properly conditioned the employees' return to work on their obtaining medical releases. The General Counsel claims that the Respondent had no legitimate medical or work-related reason to condition their reinstatement. I have analyzed the circumstances surrounding the denial of reinstatement of each of the five employees in this category. While it is true that the returning unfair labor practice strikers were entitled to immediate reinstatement upon their presenting themselves ready for work at the Respondent's facility, it was reasonable for the Respondent to require that they be medically fit to return. In cases where objective evidence shows that the Respondent had a legitimate medical reason based on work related considerations to condition reinstatement upon the presentation of a medical release, I have found that such a condition was valid. If the objective evidence shows no such legitimate medical reasons, I have found that such a condition was improper. I now turn to the consideration of each of the five employees involved in this aspect of the case.

1. Robert E. Bonds

Robert Bonds had a poststrike interview with Donaldson on September 28, 1976. There is a conflict in testimony concerning what happened at the interview. Bonds testified that after some discussion Donaldson told him he would call him if he needed him. Donaldson testified that he noticed on Bonds' application that he was drawing or had drawn workmen's compensation. He then asked Bonds whether he had been employed during the strike. Bonds refused to answer the question or any other questions from Donaldson. Bonds then left Donaldson's office stating that he was "seeing my lawyer." Donaldson did not reinstate Bonds because he "could not process his application." Donaldson also testified that he needed to show whether Bonds had suffered an injury and had collected workmen's compensation for it.

I need not resolve the conflict in testimony between Donaldson and Bonds to conclude that the Respondent placed an unreasonable impediment on Bonds' reinstatement. Donaldson's only reason for denying Bonds reinstatement was his alleged concern that Bonds had suffered an injury which somehow precluded him from returning to work. In my view there was no objective basis for such concern. There was nothing said by Bonds in the interview or on his application which would have justified the Respondent's refusal to put him back to work. Bonds had applied for reinstatement and, as an unfair labor practice striker, he was entitled to immediate reinstatement. There was no evidence that Bonds was disqualified from returning to work. His application contained the notations that he had no physical defects and had lost no time from work because of illness during the last 2 years. Donaldson purportedly focused on the notation of Bonds' application that Bonds had received workmen's compensation "when I got out of the army"—and he speculated that this might have occurred while Bonds was working during the strike. However, Bonds had worked for the Respondent since 1972 and had been discharged from the Army in 1971, facts plainly evident on the application. Donaldson thus had no objective basis for conditioning Bonds' reinstatement and it is clear that the Respondent denied Bonds the immediate reinstatement to which he was entitled without adequate reason for such denial. Bonds is thus entitled to reinstatement and backpay.

2. Eddie Scott

Eddie Scott, who is presently employed by the Respondent, participated in the strike and presented himself for reinstatement on October 4, 1976. On direct examination, Donaldson chose to read from his notes that Scott told him he was having some back trouble and was going to a "Veteran's Clinic" for treatment. Donaldson then testified that he asked Scott to obtain a doctor's release before returning to work. Scott did not return. The Respondent subsequently sent him a letter asking him to return to work and Scott did resume working for the Respondent on January 21, 1977. He did not have a doctor's statement at that time, but, according to Donaldson, Scott stated that he had no problem with his back.

Scott credibly testified that he could not remember talking to Donaldson about his back problem in the post-strike interview. He did testify that he had had back problems for some time, including the period before the strike. He testified that his work before the strike involved cleaning but "not too much" lifting. Despite leading questions which attempted to establish a nexus between his back problems and his job, Scott stated that he did not have trouble doing the job because of his back problems. His testimony thus withstood cross-examination.

I find that the Respondent's requirement in October that Scott obtain a doctor's release before returning to work was an unreasonable restraint on his reemployment. First of all, Donaldson's testimony concerning the interview is devoid of any context which would explain why he inquired into Scott's back problems. Scott's application was not introduced into evidence and Donaldson seemed so unsure of how the matter was initiated that he chose to read his notes rather than to testify directly about what Scott had said during the interview. Indeed, Donaldson testified that he did not know if Scott had ever had back problems before, although he acknowledged that Scott had had an operation after he was reemployed. Scott's records show a health claim dated July 20, 1979. Secondly, it is plain that Scott's back problems would have provided no impediment to the resumption of his old job because it did not involve heavy lifting. Significantly, Donaldson reemployed Scott in January without requiring a doctor's release. Donaldson testified that he simply relied on Scott's representation that his back was not bothering him in January. Finally, there is no firm evidence that Donaldson checked with the Veteran's Clinic about Scott's condition between October 1976 and January 1977. Donaldson's answers to questions on this point were nonresponsive and evasive. I thus credit Scott's testimony over that of Donaldson and I find that there was no reason—medical or otherwise—for the Respondent to deny Scott reinstatement to his old job. Accordingly, Scott should have been reinstated as of October 4, 1976.

Nor has the Respondent shown that Scott either did not search for work or was incapable of work during the period between October 4, 1976, and January 21, 1977. In these circumstances, Scott is entitled to backpay of $481 as alleged in the General Counsel's backpay specifications.

3. Charles Winfrey

Charles Winfrey did not testify. Donaldson's uncontradicted testimony is that Winfrey presented himself for reinstatement on October 4, 1976. When Donaldson asked why Winfrey had not reported the previous week, Winfrey stated he had been sick and was still not feeling well. Donaldson requested that Winfrey obtain a doctor's statement showing that he was able to return to work. Winfrey returned to the plant the next week stating that he could not afford to see a doctor, and that, in any event, he had not been very sick. Donaldson told him to report for work on Monday, October 18, 1976. Winfrey did not show up for work on that date, but returned to work on February 8, 1977.

The General Counsel contends that the Respondent's requirement that Winfrey obtain a doctor's release was improper and that Donaldson's testimony that he offered Winfrey reinstatement on October 18 should not be credited. I reject both contentions. In view of Donaldson's uncontradicted testimony that Winfrey stated that he was sick, it was not unreasonable for the Respondent to require Winfrey to obtain a doctor's release before he returned to work. This certainly provides a legitimate business reason for conditioning Winfrey's return to work. Moreover, there is no reason to dispute Donaldson's uncontradicted testimony on the issue of whether Winfrey was told to report to work on October 18. Accordingly, I find that Winfrey was properly denied reinstatement until he presented a doctor's release and that he was offered reinstatement on October 18, 1976, but that he failed to report as requested. He is thus not entitled to any backpay.

4. Marshall Moore

Moore testified that he reported to the plant on Wednesday, September 29. Donaldson asked him why he had not reported on Monday. Moore said he was sick and had to have a tooth pulled. Donaldson then asked Moore to return with a doctor's statement. He did so on the same day, but was told that there was no position open for him. It is unclear whether Moore was treated on Tuesday or Wednesday. Moore testified that he was taking medication at the time, but he told Donaldson he was ready to go to work.

According to Donaldson, Moore told him he had had some teeth pulled that morning and presented him with a doctor's statement. Moore said he had another appointment with the dentist on Friday, October 1, 1976, and that he could not return to work until after that appointment. Donaldson instructed Moore to bring a doctor's release to him after he visited the doctor on Friday. Donaldson testified that the doctor's statement submitted by Moore at the interview was not, in his view, a release to return to work. It merely stated that Moore received treatment on that date. Donaldson also testified that it is the Respondent's normal procedure to require a release from a doctor or dentist before an employee under treatment can be put back to work.

There is a conflict in testimony between Moore and Donaldson on one crucial point—whether Moore told Donaldson on Wednesday that he was ready to return to work or whether he told Donaldson he wanted to wait until he saw his dentist again on Friday. I do not credit Donaldson's testimony on this issue. First of all, Moore sought reinstatement on Wednesday, after a strike of some 14 months. It is highly unlikely that he would have told Donaldson that he wanted to wait until Friday to return to work, as Donaldson testified. Moore did not testify about another appointment and it seems highly unlikely, whether or not he had another appointment, that he would have presented himself for employment on Wednesday if he did not want to start work until Friday. It is more likely that Donaldson, once he found out that Moore had been treated by a dentist, would have asked Moore to return with a statement. This was his pattern

with other returning strikers whom he believed had medical problems. Moreover, Donaldson was ambivalent on this very issue. At first he testified that it was he who told Moore to wait until after his Friday, October 1, appointment to bring a release. Later he testified that it was Moore who said he could not return to work until after October 1. In either case, it was Donaldson who required a medical release for a condition which did not pose any impediment on Moore's ability to work. Since, in my view of the evidence, Moore was ready to go to work on Wednesday, notwithstanding having had some teeth pulled, it was the Respondent's obligation to put him back to work. In other cases, for example, when Scott told Donaldson in January 1977 that his back was not bothering him, Donaldson accepted an employee's word concerning his physical condition. There was thus no legitimate business reason not to accept Moore's word on this occasion.

The Respondent's argument that Moore should be discredited because he could not initially remember whether he was treated on Tuesday or Wednesday is unavailing. This was simply the result of a lapse of memory which is normal in a candid witness who was testifying years after the event without notes. I was impressed with Moore's candid and truthful demeanor. The doctor's statement clearly showed that he was treated on Wednesday. The crucial issue, as I have indicated, was whether Moore told Donaldson he was ready to work then and there or whether he wanted to wait. On this issue, Moore's version is more plausible. Donaldson's does not withstand scrutiny.

Accordingly, I find that the Respondent failed properly to reinstate Moore and is required to make him whole for the loss of pay he suffered because of the Respondent's failure to reinstate him.

5. Jerry Bowers

Bowers presented himself for employment at a post-strike interview with Donaldson on September 27, 1976. It is uncontested that Donaldson asked Bowers about a notation on his application indicating that he had a shoulder and back problem and that he had a physical examination on September 21, less than a week before, for that condition. The application also indicated that Bowers had not received workmen's compensation but that a check under the "yes" column had been erased. Bowers told Donaldson that he had been injured while working at Oakville Hospital, but he had not mentioned the hospital as a prior employer on his application. Donaldson asked Bowers to obtain a doctor's release before returning to work. Bowers agreed to secure such a release.

On this evidence, which is essentially undisputed, it is clear that Donaldson had a reasonable basis to require a medical release before returning Bowers to work. The application suggested a recent injury, and since it was occasioned on the job, there was a possible workmen's compensation liability. Donaldson testified that he normally requires a doctor's release before returning an employee to work after an injury, particularly where there is reason to believe that it is job related. Furthermore, the facts as presented to Donaldson surely raised the question of whether Bowers was medically fit to return to work. Bowers apparently accepted this decision and agreed to obtain a release.

According to Donaldson, Bowers returned a few days later with a statement that he had been treated in March 1976. He had nothing to explain the September 1976 injury or treatment. Donaldson then called the hospital where Bowers worked and inquired about Bowers' injury. He was told that Bowers had injured himself on the job and was still an employee of Oakville Hospital. The hospital sent Donaldson a copy of the injury report and a grievance he filed against the hospital protesting his suspension which was dated September 24, 1976. The hospital notified Donaldson that Bowers had been terminated effective October 1, 1976. Bowers never returned to the Respondent's facility with a medical release.

Bowers did not deny that he never returned after Donaldson rejected the statement he submitted to Donaldson which was clearly insufficient to explain his September injury. He failed adequately to explain why he did not obtain a proper medical release. Nor can I accept his testimony that he told Donaldson on September 27 that his back was "perfectly allright." Bower's testimony concerning his September injury and his employment at Oakville Hospital was wholly unreliable and at odds with documentary evidence on the matter. Moreover, his testimony as a general matter was ambiguous and unfocused. It is likely, that he told Donaldson about the injury, which he had noted on his application form, and thus Donaldson properly required a medical release.

In these circumstances I find that the Respondent set a reasonable condition for Bowers' return to work—the obtaining of a doctor's release for an injury or at least a condition which he claimed on his application had necessitated a physical examination just 6 days before. Bowers did not comply and is thus not entitled to reinstatement or backpay.[11]

G. *The Employees Who Were Denied Reinstatement Because of Alleged Misconduct*

I consider nine employees in this category. The Respondent has established in each case an honest belief that the striker engaged in misconduct. It was thus incumbent upon the General Counsel to establish that the striker either did not engage in the alleged misconduct or that the misconduct was not serious enough to foreclose reinstatement. See *General Telephone Co. of Michigan*, 251 NLRB 738–739 (1980). In most cases, the outcome turns on questions of credibility. Was the employee in fact guilty of the misconduct and was it serious enough to justify denial of reinstatement? In all but two cases, I found that the Respondent properly denied reinstatement.

[11] Contrary to the General Counsel's contention, Donaldson did not treat Bowers differently than Scott by not accepting his word as to his condition, namely that he was fit to return to work. First of all, as I have indicated, I do not credit Bower's testimony on this point. In any event, other circumstances relating to potential workmen compensation liability make Bowers' case different from that of Scott. Bowers' answers to questions on his application form put into doubt his assertion that he was fit to return to work. At the very least they presented a problem. Donaldson was thus not required to accept Bowers' word on his condition.

1. Catherine Duncan

Catherine Duncan did not testify at tbe hearing. According to Donaldson, she presented herself for reinstatement on September 27, 1976. Donaldson told her she was under investigation for possible strike misconduct and that he would contact her if he determined that she was eligible for reinstatement. Her husband, Jim Duncan, who also was employed by the Respondent, was denied reinstatement because he engaged in misconduct. Catherine denied engaging in any misconduct. Subsequently, the Respondent determined that Catherine's misconduct was not sufficiently serious to deny her reinstatement. Donaldson thereafter mailed Catherine Duncan a certified letter at the address listed on her application and on the sign-in log, offering her reinstatement. Duncan never claimed the letter from the post office.

Donaldson had received a report from Joseph Neal that Jim and Catherine Duncan had engaged in misconduct. He spoke to Jim Duncan on September 27 before he talked to Catherine. Jim admitted that he engaged in an altercation involving Neal at a grocery store. He told Donaldson that Catherine stayed in the car and had nothing to do with the fight except fnr engaging in some name calling. Donaldson then spoke with Catherine. She denied engaging in any misconduct. Donaldson thereafter spoke to Neal and, as a result, he decided to offer Catherine Duncan reinstatement.

The clear import of Donaldson's testimony is that Catherine Duncan was not, in fact, guilty of any misconduct which would have justified denying her reinstatement on September 27, 1976. She was thus entitled to be reinstated as of that date. The Respondent's failure to so reinstate Duncan was cured, however, by the certified letter sent to Duncan's last known address on October 13, 1976. The backpay to which she was entitled was tolled by that letter. Accordingly, Duncan is entitled to backpay from September 27 through October 13, 1976. She is not entitled to another offer of reinstatement.[12]

2. Lamar Ford

Lamar Ford was denied reinstatenent when he reported to the plant on September 28 because the Respondent had evidence that he engaged in strike misconduct.

On July 22, 1975, at 10:15 p.m., Supervisor Joe Wilson was driving his automobile on personal business. He was followed by a tan Cougar which cut in front of his car and forced him to stop at an intersection. The driver of the car, whom Wilson recognized as an employee at the Respondent's plant, got out and walked over to Wilson's car. Wilson, still behind the wheel, asked, "What is going on?" The man said, "As if you didn't know. You can't be stopped can you," and punched Wilson on the jaw. Wilson also noticed another employee of the Respondent approaching his car so he immediately pulled around the Cougar and drove off. Wilson testified that the intersection where he stopped was well lit and he could see his attacker clearly.

The next day Wilson reported the matter to his superior and then to Donaldson, who took a picture of his severely swollen eye and face and sent him to see the Respondent's doctor. Wilson also identified his attacker from some 200 photographs of employees shown to him by Donaldson. Although Wilson had seen the man around the plant, he did not know his name. Wilson also later identified the man to Donaldson when he observed him on the picket line.

Donaldson corroborated Wilson's photo identification of the employee whom Donaldson named as Lamar Ford. He also corroborated the fact that Wilson had serious swelling about his eye the day after the attack.

Lamar Ford denied he was involved in the assault on Wilson. However, I do not credit Ford. His testimony concentrated on denying that he even had a driver's license in the summer of 1975. But that testimony and his demeanor while testifying was not convincing. Ford claimed he paid some $300 to take driving lessons in 1979 in preparation for obtaining a driver's license and buying a car. Yet he did not buy a car until 2 years later. He did not produce his driver's license which would have established the date of issuance and might have corroborated his testimony. He claimed he first received a driver's license in May 1979. Further, in response to a question on the Respondent's application form which asked "Do you have your own transportation," Ford answered yes in September 1976. He had not answered the same question in his original application filed in 1973. Ford's explanation for this discrepancy was unconvincing. He said he had no transportation in 1973 and in 1976 he referred to bus transportation. Yet his address was the same. In these circumstances, I do not credit Ford's testimony.

In view of my credibility determination and because I found Wilson and Donaldson to have established Ford's culpability for the assault on Wilson, I find that Ford did engage in serious strike misconduct and is not entitled to reinstatement.

3. Oddies Patterson

Oddies Patterson was denied reinstatement because of alleged misconduct during the strike. On July 10, 1975, a black Pontiac forced route salesman Don Grice off the road while he was delivering products for the Respondent. Grice's truck was damaged. Thereafter, the Pontiac followed Grice's truck. At 10 a.m. he parked to make a number of deliveries and the Pontiac parked nearby. One of the four men in the Pontiac demanded that Grice's helper join the strike. As a result Grice called the Respondent's office and gave President Pidgeon the license number of the Pontiac. Pidgeon told him that the Respondent already had the license number and the police were looking for the car.

When Grice made his next delivery at Motes Beauty College, the Pontiac followed and parked about a half block away from Grice's truck. Grice left five cases of drinks on the sidewalk as he made some deliveries inside.

[12] Curiously, the General Counsel argues that the October 13 letter offer of reinstatement was invalid because "Respondent questioned Duncan and her husband concerning their alleged strike misconduct during their reinstatement interviews." The argument is wholly without merit. Surely, the General Counsel does not contend that an employer is prohibited from asking an employee to rebut allegations of strike misconduct.

When he returned he found the drinks were knocked over, broken and strewn about. The occupants of the Pontiac were standing nearby. Grice asked who was going to pay for the damage and an individual whom Grice recognized as the driver of the Pontiac said he and his friends were not going to pay and that if Grice did not get his "ass back to the plant," they would "bash my head in."

Later that afternoon Grice went to Donaldson's office and identified Oddies Patterson as the individual who was driving the Pontiac and who threatened him. Donaldson showed Grice some 8 to 10 photographs from which Grice identified Patterson.

The occupants of the black Pontiac were involved in another incident on July 10. Employee Mike Irwin had entered his truck after making a delivery when one of the occupants of the Pontiac approached him and asked him whether he knew that the Respondent's employees were on strike. The individual told Irwin if he got out of the truck he was going to "cut him." That individual subsequently left, got into the black Pontiac and drove away. Irwin copied the license number and later reported it to Donaldson. On Irwin's next stop, the driver of the Pontiac approached Irwin and again threatened to cut him if he tried to make deliveries. Irwin drove away before making the delivery and stopped to call the Respondent's office. The individual who threatened him both times was the same man and was the driver of the Pontiac.

Donaldson verified the license number given to him by Grice and it was determined that the car which carried the number belonged to Oddies Patterson. This also was the licen'e number given by Irwin.

Patterson admitted to owning the black Pontiac with the license number identified by Irwin and Grice. He testified that he drove his car to the picket line every day during the first month of the strike. However, he denied participating in the incidents described by Irwin and Grice.

I find that Patterson did indeed threaten Irwin and Grice as they testified. They were disinterested witnesses—Grice is no longer employed by the Respondent, and their testimony is consistent with that of Donaldson in establishing the identify of the car. Grice, of course, was able to identify Patterson. Patterson's attempt to deny his involvement was not persuasive. I found him to be an unconvincing witness who exaggerated his participation in picketing activities at the plant to suggest he could not have been cruising around in his car. In these circumstances, I find that Patterson's misconduct was established by credible and reliable evidence and that his misconduct was serious enough to prevent his reinstatement.

4. Robert Moore

Robert Moore was denied reinstatement because of reports that he was involved in two incidents of strike misconduct, one of which involved an alleged assault on Houston Williams who did not testify in this hearing.

The other incident involved Hank Gibson who was making deliveries in one of the Respondent's vehicles at a grocery store about 7:15 p.m. on July 8, 1975, the first day of the strike. Gibson testified that after he and his route helper, Joe Love, had made their deliveries and were headed back to the truck, they were confronted by several individuals who started cursing them. They called Gibson "a goddamn scab." Love made his way to the truck, but, as Gibson was walking to the truck, two of the men cut him off and one, whom Gibson knew by sight as an employee at the plant, asked why he was not on strike. After an exchange of words, Moore identified himself as "Mister Robert Moore." Then Moore struck Gibson on the left side of his head and Gibson fell to his knees. Love then came up and told Moore to "leave him alone." Moore backed off but continued cursing Gibson. Gibson later reported the incident to Donaldson and identified Moore from pictures provided by Donaldson.

Moore denied that he participated in the incident involving Gibson.

I do not credit Moore's denial. I credit instead the clear and reliable testimony of Gibson establishing that he was assaulted by Moore. Moore's testimony was ambiguous and evasive. He was particularly unconvincing when he first stated that he had never been arrested during the strike and later had to admit that he had. He also initially testified that he barely knew the location of the grocery store where the assault took place. Later he acknowledged that he had cashed checks at the store, which was close to the plant, and had seen the Respondent's trucks make deliveries there. In these circumstances, I find that Moore did indeed assault Gibson and that this misconduct fully justified the Respondent's refusal to reinstate him after the end of the strike.

5. Osker Lee Davis

Davis was denied reinstatement because of a report received by Donaldson that he had cut water hoses on a route truck. Donaldson relied on a statement, dated July 9, 1975, and signed by driver Holland Wise, that Wise saw two men whom he recognized as employees running from the truck and that two water hoses had been cut on the vehicle. Wise could not identify the individuals by name, but, according to Donaldson, about 1 month later, Wise pointed them out to Donaldson as they picketed the plant. Donaldson identified the individuals pointed out by Wise at that time as Osker Lee Davis and Willie King. Wise died in 1978.

Davis denied that he was involved in the hose cutting incident. He did testify that he picketed during the strike.

I do not believe that Wise's unsworn statement reliably establishes that Davis was one of the individuals who damaged the Respondent's truck. The General Counsel was unable to cross-examine Wise on the crucial circumstances surrounding his identification. And the identification is incomplete. For example, how clearly was Wise able to view the individuals? Did he see their faces? For how long was he able to observe them? There is nothing in Wise's statement—or any other evidence—which would render the initial identification reliable. Wise could not identify the individuals by name. He knew only that they worked at the plant. Although he later identified Davis, who was on the picket line, as one of

the two individuals, it is the reliability of his first identification which remains suspect.

In addition, I viewed Davis as a credible and candid witness. His denial that he participated in the hose cutting incident seemed to be genuine. His testimony was not shaken by the cross-examination of the Respondent's counsel. His imprecision on dates and times was consistent with the candor of a credible witness testifying about events which occurred years before.

Considering all the evidence, including the testimony and demeanor of Davis, I find that he was not in fact involved in any misconduct during the strike. He is thus entitled to reinstatement and backpay.

6. Charles Short and Willie King

Charles Short and Willie King were denied reinstatement because of alleged misconduct. Although each was involved in a second incident of alleged misconduct, the most serious allegation against both was that they aided employee Harry Malone in an assault on employee John Randall. Malone was denied reinstatement and the General Counsel has not contested the denial of his reinstatement.

The Respondent's evidence of the involvement of King and Short in the assault of Randall comes from Carroll Gholston, an official of the Respondent. On September 4, 1975, Gholston was leaving the plant in his car on the way home. As he came to an intersection near the plant, he noticed four individuals fighting. He knew and identified all four individuals. He saw Short and King holding Randall by his arms and he saw Malone hit Randall with a two by four. Randall fell to the ground and was kicked by King and Short. Gholston was about 20 feet away when the assault took place. Gholston left his car to attend to Randall and the three other individuals ran away. Gholston drove Randall first to the Respondent's premises and then to a hospital. He also furnished information about the incident to the police.

That same night Short was apprehended. At the time, his arm was bleeding. He was asked by the police what had happened to his arm and he told them he had been watching a fight. Short was arrested and spent the night in jail. He was apparently drunk. Short was released the next morning. He was unable to state whether he was ever charged or tried for his alleged participation in the assault, although he does remember a court proceeding. Malone was convicted.

Short denied he participated in the assault on Randall. He admitted being present. However, according to Short, he was simply walking toward the plant to return to the picket line. He saw Malone and Randall from a distance and continued to walk in the same direction. When he came upon the two men, he observed Malone hit Randall with a stick. The stick broke and cut Short's arm. According to Short, Randall got up and ran towards the plant. He saw no one else around and specifically said that King was not present. Short claims he then headed towards a friend's house to have his arm bandaged. He left his friend's house and went to a liquor store after which he was confronted by the police. According to Short, when he was arrested, the police had the victim in a squad car and the victim said that Short was not his assailant. Neither Randall nor King testified.

I find, in accordance with the testimony of Gholston, that King and Short participated in the assault on Randall. Short's testimony was wholly incredible. His story about why he walked into a situation which he knew might be dangerous is implausible. In addition, his explanation of how he injured his arm when the stick or board broke after Randall was struck defies belief. Gholston's testimony, on the other hand, was clear and reliable. He had no reason to fabricate and he impressed me as an honest and credible witness. In these circumstances, I find that King and Short engaged in serious misconduct when they aided and abetted Malone in an assault on employee Randall. They were thus properly denied reinstatement.

7. Leon O'Kelley

Leon O'Kelley was denied reinstatement because he was engaged in strike misconduct. He also told Donaldson that he was presently working for Atlantic Ice Company but that he would like to work for the Respondent on the night shift so he could keep the Atlantic Ice job.

The evidence relied on by the Respondent was provided by an official of the Respondent, Randy Reed, whose car was struck by a wine bottle while he was driving along a street near the plant on July 10, 1975. Reed saw an individual wearing a football jersey throw something in his direction. He heard the impact of an object which struck his car, stopped, and observed the individual running by the rear of his car. Reed saw the individual's face and recognized him as an employee of the Respondent, although he did not know his name. The next day Reed saw the man on the picket line and identified him to Donaldson. He was wearing the same football jersey he had worn the day before. Reed also identified the man from a group of photographs. The man Reed identified was Leon O'Kelley.

O'Kelley denied he threw a wine bottle at Reed's car. He testified at an injunction hearing dealing with the strike about the wine throwing incident and other alleged incidents of misconduct. He was wearing a football jersey at the injunction hearing and Reed again identified him at this hearing as the one who threw the bottle at him.

I find that O'Kelley did indeed throw the wine bottle at Reed's car. I do not credit O'Kelley's testimony. His testimony was contrived on a number of issues. For example, he seemed to take great pains to deny that he was a wine drinker, stating that he did imbibe other alcoholic beverages. But he did admit to owning a football jersey, thus corroborating at least part of Reed's very clear and credible identification. Nor was O'Kelley's testimony credible on a second issue, that is, whether he abandoned an interest in reemployment with the Respondent. Donaldson credibly testified that about a week after he refused O'Kelley's reinstatement O'Kelley returned and told him that he decided to remain with Atlantic Ice and did not desire to return to work with the Respondent. He signed a separation slip at this time. According to O'Kelley, he spoke to Donaldson only once and, as he

was filling out his application, he changed his mind and decided not to work for the Respondent. O'Kelley's reason for his change of heart was not credible. He said that some of his friends had gone back to work but had not been satisfied with the "environment." At this point he had a job with Atlantic. O'Kelley's own testimony tends to establish O'Kelley's desire not to return to work for the Respondent. However, O'Kelley's testimony in this respect also demonstrates his general unreliability as a witness. I find, in accordance with Reed's testimony, that O'Kelley threw a wine bottle at Reed while he was driving a car. The incident was serious and independently justified the denial of the reinstatement of O'Kelley. Donaldson's testimony also establishes that O'Kelley did not want to return to work for the Respondent because he was satisfied with his job at Atlantic Ice. Accordingly, O'Kelley is not entitled to reinstatement.

8. Gunter Parks

Parks was denied reinstatement because of alleged strike misconduct.

According to Gordon Pugh, who was employed in July 1975 as a driver for the Respondent, he had just finished making deliveries to Hill's Grocery Store on July 10 when he observed two strikers beating his helper, Raymond McGee. One, George Jackson, was striking McGee while another, whom Pugh recognized as "Slim," was holding McGee by his legs. McGee was bleeding and his head was skinned. Slim jumped up and shouted at Pugh and both men approached him. The store owner then came out with a gun and the two men fled towards their car. One of them dropped a metal lug wrench. Pugh called the police and attended to McGee. Pugh identified Gunter Parks as the man who held McGee's legs both in a photograph provided by Donaldson and in a court proceeding. According to Donaldson, McGee also identified Parks, in Donaldson's presence, as one of his attackers.

Parks admitted that he was present when Jackson attacked McGee 3 days after the strike began. Jackson was driving his car and Parks was a passenger in the car when they approached the grocery store. According to Parks, Jackson got out of the car, confronted McGee, and they began fighting. Parks got out of the car and saw Jackson hit McGee once with his fist. Jackson then ran back to his car, as did Parks, and they drove away. According to Parks, he heard that a warrant had been issued for his arrest and he turned himself into the police the next day. Parks went to court but the charges against him were dropped.

I credit the testimony of Pugh which was clear and detailed. Parks was an evasive witness both in failing to initially admit that he had been called "Slim" and also to adequately explain the assault. He was unable to explain in any meaningful detail why he got out of the car during the assault and why he simply stood around doing nothing. He did not see Pugh or the store owner and could not explain why Jackson ran back to the car. Parks' testimony was so vague and unreliable that I cannot credit him.

In view of the credited testimony, it is clear that Parks aided in the assault on a nonstriking employee. His participation was not benign. He held McGee while Jackson hit him. He shouted at Pugh when the latter came on the scene. Parks was not an innocent observer. Accordingly, he was guilty of serious misconduct which disqualifies him from reinstatement.

CONCLUSIONS OF LAW

1. By failing to fully and properly reinstate unfair labor practice strikers Catherine Duncan, Osker Lee Davis, Geneva Sheffa, Tinnie Mae Kones, Pearlie Turner, Robert Bonds, Eddie Scott, and Marshall Moore, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. The above violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent has not otherwise violated the Act.

THE REMEDY

I shall recommend that Respondent cease and desist from engaging in the conduct found unlawful herein and post an appropriate notice. Having found that the Respondent unlawfully denied reinstatement to the employees named above I shall recommend that the Respondent offer immediate reinstatement to Davis, Bonds, Moore, Kones, and Turner to their former jobs, displacing, if necessary, employees who presently occupy those jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any and all losses of earnings suffered by them because of the Respondent's unlawful conduct. Since I have found that the Respondent's obligation to reinstate Duncan have been satisfied and that Scott and Sheffa have been reinstated, these employees shall only be entitled to backpay. Sheffa is entitled to backpay of $3821; Scott is entitled to backpay of $481 and Duncan is entitled to backpay from September 27 through October 13, 1976. Backpay for all employees is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[13]

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following[14]

ORDER

The Respondent, the Coca-Cola Bottling Company of Memphis, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to properly reinstate unfair labor practice strikers to their former positions if they exist, or substantially equivalent positions, if they do not, upon their unconditional offer to return to work at the end of a strike.

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[13] See generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Otherwise discriminating against employees because they participate in a strike or other concerted protected activity under Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer employees Osker Lee Davis, Tinnie Mae Kones, Pearlie Turner, Robert Bonds, and Marshall Moore immediate and full reinstatement to their former jobs, discharging if necessary present occupants of those jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them and Catherine Duncan whole for any loss of pay suffered by them in the manner described in the "Remedy" section of this decision.

(b) Pay to Geneva Sheffa the sum of $3821 and to Eddie Scott the sum of $481 plus interest accrued to the date of payment, less appropriate amounts for special security taxes and income tax withholdings required by Federal, state, and local laws, in accordance with the "Remedy" section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Memphis, Tennessee place of business, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

IT IS ALSO ORDERED that those allegations as to which violations were not found are hereby dismissed.

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[15] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."